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REPORTS OF CASES
DECIDED IN THE
SUPREME COURT
OF THE
STATE OF OREGON

FRANK A. TURNER
REPORTER

VOLUME 81

**DECISIONS RENDERED BETWEEN JUNE 6, 1916, AND NOVEM-
BER 21, 1916**

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1917

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JUDICIAL DISTRICTS AND CIRCUIT JUDGES

IN THE

STATE OF OREGON

November 21, 1916.

First Judicial District—

Jackson }
Josephine } FRANK M. CALKINS, Medford.

Second Judicial District—

Coos }
Curry } JOHN S. COKE, Marshfield.
Douglas }
Benton } JAMES W. HAMILTON, Roseburg.
Lane }
Lincoln } GEORGE F. SKIPWORTH, Eugene.

Third Judicial District—

Linn } PERCY R. KELLY, Department No. 1, Albany.
Marion } WILLIAM GALLOWAY, Department No. 2, Salem.

Fourth Judicial District—

Multnomah }
JOHN P. KAVANAUGH, Department No. 1, Port-
land.
ROBERT G. MORROW, Department No. 2, Port-
land.
HENRY E. MCGINN, Department No. 3, Port-
land.
GEORGE N. DAVIS, Department No. 4, Portland.
WILLIAM N. GATENS, Department No. 5, Port-
land.
CALVIN U. GANTENBEIN, Department No. 6, Port-
land.

Fifth Judicial District—

Clackamas JAMES U. CAMPBELL, Oregon City.

Sixth Judicial District—

Morrow }
Umatilla } GILBERT W. PHELPS, Pendleton.

Seventh Judicial District—

Hood River }
Wasco } WILLIAM L. BRADSHAW, The Dalles.

Eighth Judicial District—

Baker GUSTAV ANDERSON, Baker.

Ninth Judicial District—

Grant }
Harney } DALTON BIGGS, Ontario.
Malheur }

Tenth Judicial District—

Union }
Wallowa } **JOHN W. KNOWLES, La Grande.**

Eleventh Judicial District—

Gilliam }
Sherman } **DAVID R. PARKER, Condon.**
Wheeler }

Twelfth Judicial District—

Polk }
Yamhill } **HARRY H. BELT, Dallas.**

Thirteenth Judicial District—

Klamath..... **DELMON V. KUYKENDALL, Klamath Falls.**

Fourteenth Judicial District—

Lake..... **BERNARD DALY, Lakeview.**

Eighteenth Judicial District—

Crook..... }
Jefferson..... } **T. E. J. DUFFEY, Prineville.**

Nineteenth Judicial District—

Tillamook..... }
Washington..... } **GEORGE R. BAGLEY, Hillsboro.**

Twentieth Judicial District—

Clatsop..... }
Columbia..... } **JAMES A. EAKIN, Astoria.**

DISTRICT ATTORNEYS

IN THE

STATE OF OREGON

November 21, 1916.

County.	Name.	Official Address.
Baker.....	Godwin, C. T.....	Baker
Benton.....	Clarke, Arthur.....	Corvallis
Clackamas.....	Hedges, Gilbert L.....	Oregon City
Clatsop.....	Mullins, C. W.....	Astoria
Columbia.....	Cooper, W. H.	St. Helens
Coos.....	Liljeqvist, Lawrence A.....	Coquille
Crook.....	Wirtz, Willard H.....	Prineville
Curry.....	Johnson, James C.	Gold Beach
Douglas.....	Neuner, Jr., George.....	Roseburg
Gilliam.....	Weinke, T. A.....	Condon
Grant.....	Cozad, V. G.....	Canyon City
Harney.....	Sizemore, Geo. S.....	Burns
Hood River.....	Derby, A. J.....	Hood River
Jackson.....	Kelly, E. E.....	Medford
Jefferson.....	Myers, W. F.....	Culver
Josephine.....	Miller, W. T.....	Grants Pass
Klamath.....	Irwin, John.....	Klamath Falls
Lake.....	Gibbs, O. C.....	Lakeview
Lane.....	Devers, Joseph M.....	Eugene
Lincoln.....	Stewart, J. F.....	Toledo
Linn.....	Hill, Gale S.....	Albany
Malheur.....	Brooke, W. H.....	Ontario
Marion.....	Ringo, Ernest R.....	Salem
Morrow.....	Wells, Glenn Y.....	Heppner
Multnomah.....	Evans, Walter H.....	Portland
Polk.....	Sibley, Joseph E.....	Dallas
Sherman.....	Huddleston, C. M.....	Wasco
Tillamook.....	Goyne, T. H.	Tillamook
Umatilla.....	Steiber, Frederick H.....	Pendleton
Union.....	Eberhard, Colon R.	La Grande
Wallowa.....	Corkins, O. M.....	Enterprise
Wasco.....	Bell, W. A.....	The Dalles
Washington.....	Tongue, E. B.....	Hillsboro
Wheeler.....	Starr, J. K.....	Fossil
Yamhill.....	Conner, B. L.....	McMinnville

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This should be *Taylor v. Smith.*

76 Or. 580—*Vincent v. First Nat. Bank.*

In line 2 of statement, the word "Roseburg" should be "Newburg."

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Laws 1913, p. 304, Section 1, subd. 23....	587, 590, 591, 594, 594, 595
Laws 1913, p. 458.....	372, 378
Laws 1913, p. 545.....	392, 393, 443, 445
Laws 1913, p. 546, Section 10.....	391, 395, 395, 445, 446
Laws 1913, p. 546, Section 11.....	445, 446
Laws 1913, p. 546, Section 12..	442, 443, 445, 446, 447, 447, 448, 449, 449
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Laws 1913, p. 576.....	626, 626, 629
Laws 1915, p. 97.....	295, 295, 295, 296, 297
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Laws 1915, p. 124.....	210, 210, 212, 213, 213, 215, 217, 218
Laws 1915, p. 151, Section 5.....	614, 619
Laws 1915, p. 151, Section 7.....	614, 617, 618
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Laws 1915, p. 151, Section 41.....	618
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CASES DECIDED
IN THE
SUPREME COURT
OF
OREGON.

Submitted on brief May 2, affirmed June 6, 1916.

CHILDERS v. BROWN.*

(158 Pac. 166.)

Exemptions—Construction of Statute.

1. Since exemption statutes are remedial in character, they are given a liberal construction.

Exemptions — Property Exempt—Construction of Statute—"Necessary"—"Occupation."

2. Under Section 227, L. O. L., as amended by Laws of 1915, page 27, making the team, vehicle, harness, etc., necessary to enable any person to carry on the trade, occupation or profession by which he habitually earns his living exempt from execution, the term "necessary" signifies "reasonably necessary" or "convenient" or "suitable," and does not mean "indispensable" or "absolutely necessary"; and standing alone, the word "occupation" means the principal business of one's life, habitual or stated employment, vocation, calling, trade, the business in which one principally engages to secure a living, the employment by which he generally gets his living, and includes any employment in which a person is engaged to procure a living.

Exemptions—Construction of Statute—Occupation.

3. Under such statute, it is not essential that the property should have been used exclusively to carry on the occupation by which one habitually earns his living, because an occasional use for other purposes will not defeat his right to exemption; and such right is not lost if the owner is not actually using the property in his occupation at the very time of the levy, or if temporarily, he is not engaged in his

*As to the purposes for which horses are used as affecting exemption under the statute specifically exempting horses from execution or attachment, see note in 3 L. R. A. (N. S.) 693. And as to what is a trade, occupation or business within exemption laws, see note in L. R. A. 1915F, 916.

occupation, and is preserved if he honestly intends to use the property within a reasonable time to carry on his occupation.

Exemptions—Horse, Vehicle, Harness, etc.—Construction of Statute.

4. Under Section 227, L. O. L., as amended by Laws of 1915, page 27, exempting from execution a team, vehicle, harness, etc., necessary to enable anyone to carry on the occupation by which he habitually earns his living, the debtor may select and reserve a team, vehicle and harness without being obliged to show that he has no other like property, or to point out other property to the sheriff, even though he owns additional property of the same kind, and the debtor, if owning more than two horses, may select any two.

Exemptions—Construction of Statute—Assertion of Exemption—"At"—"As Soon As."

5. Under Section 227, L. O. L., as amended by Laws of 1915, page 27, exempting from execution a team, vehicle, harness, etc., necessary to enable one to carry on his occupation, if selected and reserved by the judgment debtor at the time of the levy or as soon thereafter before sale as it shall be known to him, a failure to select exempted property at the exact time of the levy, even though the debtor is present, will not alone operate as a waiver of his right, as the word "at," when used in reference to time, does not always mean the exact moment or day, but may express nearness and proximity, and consequently may denote a reasonable time, and as the words "as soon as" likewise have a restricted and an unrestricted signification; so that the debtor, if he acts before sale, may assert his right of exemption within a reasonable time after the levy becomes known to him, whether he was present or absent at the time of the seizure.

Exemptions—Waiver.

6. The right of exemption from execution is a privilege which may be waived by the consent of the debtor, or by his failure to assert his rights.

Exemptions—Right to Exemption—Burden of Proof.

7. A sheriff's seizure on attachment cannot be avoided, unless the debtor alleges and proves a situation bringing the property within the exemption statute, and avers and establishes every fact essential to the exemption.

Pleading—Defects—Reply—Aider by Verdict.

8. In replevin for a team, wagon and harness attached by defendant sheriff, the taking of which was justified by his answer, a reply claiming an exemption and right to a return of the property under the statute (Section 227, L. O. L., as amended by Laws of 1915, page 27), exempting from execution a team, vehicle, harness, etc., necessary to enable one to carry on the occupation by which he habitually earns his living, showing that the property was being used by plaintiff for the purpose of earning a living for the support of his family, and that it was the only property of the kind which he could use, and that it had been habitually used for that purpose, was sufficient after verdict.

Trial—Cautionary Instruction—Discretion of Court.

9. Refusal of a cautionary instruction is within the discretion of the trial court.

Trial—Requested Instructions—Given Instructions.

10. Requested instructions, given in substance, were properly refused.

Appeal and Error—Question of Fact—Review.

11. The verdict of the jury on conflicting evidence forecloses any inquiry into the credibility of the witnesses or the weight of their testimony.

[As to exemption of tools and implements from execution, see note in 123 Am. St. Rep. 139.]

From Malheur: DALTON BIGGS, Judge.

In Banc. Statement by MR. JUSTICE HARRIS.

J. I. Myers commenced an action to recover money from James H. Childers, and on the next day, November 24, 1915, caused Ben J. Brown, the sheriff of Malheur County, to attach and take into his custody a team, wagon and harness owned by Childers. On December 10, 1915, Childers commenced this action to replevin the attached property by filing a complaint which contains the usual allegations.

The answer justifies the taking by averring the attachment. The reply seeks to avoid the effect of the attachment by claiming that the property is exempt from seizure. To support the claim of exemption and right to a return of the property, the reply avers:

“That on the twenty-fourth day of November, 1915, the date on which said personal property described in the complaint and answer were wrongfully and unlawfully taken from the possession of plaintiff, and for some time prior thereto, the said team of geldings, logging harness and Studebaker wagon described in the complaint herein, were being used by the plaintiff for the purpose of earning a living for the support of his family, and were and are habitually used for such purpose by plaintiff, and were and are the only personal property of such nature whereby the plaintiff could earn a living for the support of his family. That on the twenty-fourth day of November, 1915, the plaintiff duly notified the defendant that he claimed

said personal property and the whole thereof as exempt from attachment and execution, under the laws of the State of Oregon, and prior to the commencement of this action, and as soon as plaintiff could secure legal services, he served on the defendant a written affidavit under oath demanding the release of said property and the whole thereof, for the reason that said property was habitually used by him in making a living for himself and family, and claimed the whole of said property as exempt from attachment and execution, and that said property was and is exempt from attachment and execution, under and by virtue of the laws of the State of Oregon, and any taking of said property and the whole or any part thereof by defendant, whether acting under a writ of attachment or otherwise is wrongful and unlawful, for the reason that said property is exempt from attachment and execution, and said sheriff, defendant herein, has full and complete instructions under any writ of attachment issued to him, not to attach or levy upon any exempt property, made so by the laws of the State of Oregon, but defendant did then, ever since has, and does now refuse to return said property to plaintiff.”

The defendant demurred to the new matter appearing in the reply “on the grounds that the same does not state facts sufficient to constitute a defense to the defendant’s answer or to any part thereof.” The demurrer was overruled, and after a trial the verdict of the jury and judgment of the court were against the defendant, who has appealed.

Submitted on brief under the proviso of Supreme Court Rule 18: 56 Or. 622 (117 Pac. xi).

AFFIRMED.

For appellant there was a brief over the names of *Mr. H. C. Eastman* and *Messrs. Smith & Smith*.

For respondent there was a brief submitted by *Mr. Ralph W. Swagler*.

MR. JUSTICE HARRIS delivered the opinion of the court.

“The principal issues,” quoting from the abstract of record filed by defendant, “are: Does the new matter set up in the reply plead statutory exemption? And, was the judgment based on sufficient evidence?” The questions can best be answered by first directing attention to the language of the statute and noting its scope and meaning.

1, 2. The material part of the statute, which measures the rights of the plaintiff, reads thus:

“All property * * of the judgment debtor, shall be liable to an execution, except as in this section provided. The following property shall be exempt from execution, if selected and reserved by the judgment debtor or his agent at the time of the levy, or as soon thereafter before sale thereof as the same shall be known to him, and not otherwise: * * 3. The * * team, vehicle, harness * * necessary to enable any person to carry on the trade, occupation or profession by which such person habitually earns his living, to the value of \$400”: Chapter 13, Laws 1915, amending Section 227, L. O. L.

If the wagon, team and harness were necessary to enable Childers to carry on the occupation by which he habitually earned his living, then he was entitled to a return of the property, provided the claim of exemption was made at the time of the levy or as soon thereafter as it became known to him. Since exemption statutes are remedial in character, they are given a liberal construction: *Blackford v. Boak*, 73 Or. 61 (143 Pac. 1136); *Tishomingo Sav. Inst. v. Young*, 87 Miss. 473 (40 South. 9, 112 Am. St. Rep. 454, 6 Ann. Cas. 776, 3 L. R. A. (N. S.) 693). And this rule of construction must constantly be kept in mind when interpreting the words found in the statute.

The term "necessary," as it is used here, signifies "reasonably necessary" or "convenient" or "suitable," and it does not mean "indispensable," or, as contended by the defendant during the trial, "absolutely necessary": *Stewart v. McClung*, 12 Or. 431, 435 (8 Pac. 447, 53 Am. Rep. 374); *State v. Young*, 74 Or. 399, 407 (145 Pac. 647); *In re Parker*, 5 Sawy. 58, 61 (Fed. Cas. No. 10,724); 12 Am. & Eng. Ency. of Law (2 ed.), 132; 18 Cyc. 1418.

Standing alone, the word "occupation" means: "The principal business of one's life": Webster Dict. "Habitual or stated employment": Cent. Dict. "Vocation, calling, trade, the business in which one principally engages to secure a living, the employment by which one generally gets his living": 3 Words and Phrases (Second Series), 685; 29 Cyc. 1344. The term "occupation" is comprehensive in its signification and includes any employment in which a person is engaged to procure a living: 12 Am. & Eng. Ency. of Law (2 ed.), 105. The statute itself defines the term so as to include only the occupation by which a person "habitually earns his living," and therefore the team, wagon and harness were exempt if they were reasonably necessary, or convenient, or suitable to enable Childers to carry on the employment by which he habitually earned his living.

3. It is not essential that the property should have been used exclusively to carry on the occupation by which he habitually earned his living because an occasional use for other purposes will not defeat the right of exemption: 12 Am. & Eng. Ency. of Law, 132; *Stanton v. French*, 91 Cal. 274 (27 Pac. 657, 25 Am. St. Rep. 174); 11 R. C. L., p. 519. The right of exemption is not lost if the owner is not actually using the property in his occupation at the very time of the levy, nor is the privilege extinguished if the owner is tem-

porarily not engaged in his occupation: 12 Am. & Eng. Ency. of Law (2 ed.), 132; 18 Cyc. 1413. The exemption is preserved if the debtor honestly intends to use the property within a reasonable time to carry on his occupation: *Gollnick v. Marvin*, 60 Or. 312, 316 (118 Pac. 1016, Ann. Cas. 1914A, 243); *Cleveland v. Andrews*, 5 Idaho, 65 (46 Pac. 1025, 95 Am. St. Rep. 165).

4. The statute confers upon the debtor the right to select and reserve a team, vehicle and harness without being obliged to show that he has no other like property. There is no duty resting upon the debtor to prove that he has no other property nor to point out other property to the sheriff, even though he owns additional property of the same kind. If Childers owned more than two horses it was nevertheless his right to select any two horses he wished, and then protect them by exercising his right of exemption: *Thibault v. Lennon*, 39 Or. 280, 283 (64 Pac. 449, 87 Am. St. Rep. 657).

5, 6. A strict application of the language of the statute would require the debtor to assert his right of redemption "at the time of the levy" or "as soon" as the levy shall be known to him, but the words employed are softened and relieved of any undue severity when viewed in the light of the rule of liberal construction. While it is true that, as taught in *Harrisburg Lumber Co. v. Washburn*, 29 Or. 150, 161 (41 Pac. 390), the right of exemption is a privilege, which it must be conceded can be waived by the consent of the debtor or by his failure to assert his rights (12 Am. & Eng. Ency. of Law (2 ed.), 191; 11 R. C. L., p. 539), nevertheless a failure to select exempted property at the exact time of a levy, even though the debtor is present, will not alone operate as a waiver because the debtor has a reasonable time after he knows of the levy to claim his exemption. If the words "at the time of the

levy'' are given a strict construction, they would signify the exact moment of the levy, and would indicate ''simultaneousness,'' as distinguished from ''subsequence,'' and therefore, within this severe meaning, the debtor, if present at the time of the seizure, would lose his right of exemption, unless he asserted his claim at the very moment of the levy. When used in reference to time, the word ''at'' does not always mean the exact moment or day, but certainly in many, and perhaps in most, instances it expresses nearness, closeness and proximity, and consequently may denote a reasonable time: 5 C. J. 1427. The words ''as soon as'' likewise have a restricted and an unrestricted signification. The narrowed meaning would require the debtor to act the very moment he learns of the levy, while the broader interpretation would afford a reasonable time. Obeying the teaching of precedents and adopting the liberal, rather than the severe, meaning, the language of the statute permits the debtor, if he acts before sale, to assert his right of exemption within a reasonable time after the levy becomes known to him, whether he was present or absent at the time of the seizure.

7. We now notice the objections made by the defendant. Complaint is made because the demurrer to the reply was overruled. At the outset it must be premised that the seizure made by the sheriff cannot be avoided, unless the plaintiff alleges and proves a situation which brings the property within the exemption statute. The burden is on the claimant, and he must aver and establish every fact essential to the exemption: *Gollnick v. Marvin*, 60 Or. 312, 316 (118 Pac. 1016, Ann. Cas. 1914A, 243); *Thibault v. Lennon*, 39 Or. 280, 284 (64 Pac. 449, 87 Am. St. Rep. 657); *Stewart v. McClung*, 12 Or. 431, 436 (8 Pac. 447, 53 Am. Rep. 374); 11 R. C. L., p. 558; 18 Cyc. 1493.

8. The sheriff argues that the reply is insufficient because it fails to allege that Childers had an occupation, or that the attached property was necessary to enable him to carry on such occupation, or that he selected the property at the time of the levy. It is true that the reply does not in so many words say that Childers had a defined occupation; but it does appear that the property was being used for the purpose of earning a living for the support of his family, that it was the only property of the kind which he could use, and that it had been habitually used for that purpose; and this is only a loose and defective way of saying that he had an employment by which he habitually earned his living, and therefore an occupation, and that the team, wagon and harness were necessary to enable him to carry on such occupation: See *Blackford v. Boak*, 73 Or. 61, 66 (143 Pac. 1136). The pleadings recite that the seizure was made on November 24, 1915, and the reply alleges that on the same day Childers notified the defendant that he claimed the personal property "as exempt from attachment and execution." While the reply is not a model pleading, still it contains enough to enable it to stand after verdict.

9. One assignment of error is predicated upon the failure of the court to give a cautionary instruction requested by the defendant. The court had a right to use his discretion: *Scheurmann v. Mathison*, 67 Or. 419, 424 (136 Pac. 330); *Nordin v. Lovegren Lumber Co.*, 80 Or. 140 (156 Pac. 587). After inspecting the record we cannot say that the trial judge abused the discretion vested in him, or that the defendant was injured in any way.

10. Other instructions requested by the defendant and refused by the court were either given in substance or properly refused, because containing expressions

inconsistent with the views stated here. No prejudicial error occurred during the trial.

11. There was evidence to sustain every material fact which the plaintiff was required to establish, and, while there was conflicting evidence, the verdict of the jury forecloses any inquiry into the credibility of the witnesses or the weight of their testimony.

The judgment is affirmed.

AFFIRMED.

MR. JUSTICE EAKIN absent.

Motion to dismiss appeal allowed June 13, 1916.

BAKER v. STACY.

(157 Pac. 1071.)

Appeal and Error—Grounds for Dismissing Appeal.

1. Where the defendant, after perfecting an appeal, satisfies the judgment, his appeal on motion of plaintiff should be dismissed.

From Multnomah: GEORGE N. DAVIS, Judge.

This is an action by G. Evert Baker, trustee, and H. L. Ganoë, trustee, against Jennie H. Stacy. From a judgment in favor of plaintiffs, defendant appeals. Respondents file motion to dismiss the appeal upon the ground set forth in the opinion of the court.

MOTION ALLOWED.

Mr. G. Evert Baker and Messrs. Ganoë, English & Ganoë, for the motion.

Mr. William M. La Force and Messrs. Ganoë, English & Ganoë, contra.

In Banc. MR. JUSTICE McBRIDE delivered the opinion of the court.

1. The plaintiffs brought an action against the defendant to recover for rent due upon certain premises

leased to defendant, and recovered a judgment for the sum of \$320, and \$24.55 costs, upon which judgment they realized by execution the sum of \$76.75. The defendant perfected an appeal to this court, but subsequently thereto tendered plaintiffs \$280.21, being the balance then due upon the judgment, and demanded satisfaction of the judgment. Plaintiffs accepted the tender, satisfied the judgment upon the record, and now move to dismiss this appeal. As defendant has accepted the results of the judgment by paying it and obtaining a satisfaction upon the record, plaintiffs should not be put to the expense of filing briefs and further contesting the matter here.

The appeal is dismissed.

MOTION ALLOWED.

Argued June 2, affirmed June 13, 1916.

SPORES v. MAUDE.*

(158 Pac. 169.)

Dismissal and Nonsuit—Suits in Equity—Remedies at Law.

1. In view of Sections 1, 389, L. O. L., in Oregon a distinction is made between actions at law and suits in equity, and although courts of law and equity are presided over by the same judges, a suit in equity must be dismissed where there is a remedy at law.

Attachment—Statute—Strict Compliance.

2. Under Section 295, L. O. L., providing for attachment upon an unsecured contract for the direct payment of money or upon contract where defendant is a nonresident, the attachment was an ancillary provisional remedy and the statute must be strictly followed or no right is thereby acquired.

Reformation of Instruments—Nature of Remedy.

3. The reformation of a deed is a remedy peculiar to a court of equity.

*For authorities on the question of relief from mistake of law as to effect of instrument, see comprehensive note in 28 L. R. A. (N. S.) 785.
REPORTER.

Attachment—In Equitable Action.

4. In a suit in equity, jurisdiction is not acquired by the attachment of property of a nonresident defendant, so as to authorize the court, upon service of summons by publication, to order the condemnation and sale of the land to satisfy the judgment.

Costs—Nature of Remedy.

5. Under Section 561, L. O. L., costs are certain sums of money prescribed by statute as indemnity on account of attorney fees in prosecuting or defending a suit or action.

Costs—In Equity—Discretionary.

6. Under Section 567, L. O. L., the allowance of costs in a suit in equity is a matter resting in the sound discretion of the court.

Appearance—Special Appearance.

7. Under Section 542, L. O. L., providing that a defendant appears when he answers, demurs or gives written notice of appearance, and Section 63, making a voluntary appearance equivalent to personal service, an oral question of counsel as to the allowance of costs, where his motion on special appearance to dismiss an attachment has been granted, is not a general appearance.

[As to test of whether appearance is general or special, see note in Ann. Cas. 1914A, 1189.]

From Lane: GEORGE F. SKIPWORTH, Judge.

Department 1. Statement by MR. CHIEF JUSTICE MOORE.

This is a suit by George W. Spores and Josie Spores against Eustace Maude and Amy Maude to reform a deed and to recover a sum of money. The complaint alleges in effect that on October 20, 1909, the defendants were the owners of two lots, particularly describing them, in Springfield, Oregon, and then orally agreed to sell and convey the real property to the plaintiffs clear of all encumbrances, and particularly free from the expense of constructing in front of such premises a cement sidewalk, curb and gutter, which improvements had then been completed, but no assessment therefor had been made; that the plaintiffs paid \$4,000, the stipulated consideration, to the defendants, who executed to them a deed of general warranty; that it was mutually understood by the par-

ties that such covenant was sufficient to include the assessment so to be made, and the deed was accepted by the plaintiffs, who relied upon the oral agreement that they would not be required to pay for such improvement, and they supposed the defendants had discharged that obligation until about November 1, 1914, when the lots were advertised to be sold for \$170.74, the amount of the delinquent assessment, interest and costs; that the defendants have not paid any part of that sum, and refuse to make such payment because no entry had been made on the docket of city liens when the deed was executed, and there was therefore no breach of the covenant of warranty.

The prayer of the complaint is that the deed may be corrected so as to insert therein a covenant that the defendants will pay the expense of such improvement; that upon such reformation they be decreed to pay the plaintiffs \$170.74, with interest and the costs and disbursements herein; that if the defendants fail or refuse to make such payment within 20 days from the date of the decree, the plaintiffs may be permitted to sell upon execution the defendants' real property which has been attached herein. A summons was issued in this suit, and an affidavit for an attachment having been made and an undertaking therefor given and filed, a writ was issued, pursuant to which real property of the defendants in Lane County, Oregon, was undertaken to be attached, and they, being non-residents of this state, the summons was served by publication. The defendants, appearing specially, moved to set aside such attempted service and to dissolve the attachment on the ground that no writ therefor can be legally issued in a suit in equity. This application being heard, the court orally remarked: "The defendants' motion to quash the summons and the writ

of attachment is sustained.” To this observation, the defendant’s counsel verbally inquired: “With costs?” The court replied: “With costs.” Thereupon a verified itemized cost bill, amounting to \$12.50, was filed. Upon motion, however, of the plaintiffs’ counsel the costs were retaxed at \$7.50, and a judgment was entered therefor, and also setting aside the attempted service of the summons by publication and dissolving the attachment. The costs and disbursements so taxed having been paid, the judgment was satisfied on the record. Thereupon the plaintiffs’ counsel moved for an order fixing the time within which the defendants should be required to answer, demur or plead, or, failing to comply therewith, that their default be entered of record. This motion was denied, and from such determination the plaintiffs appeal. **AFFIRMED.**

For appellants there was a brief and an oral argument by *Mr. John H. Bower*.

For respondents there was a brief and an oral argument by *Mr. Jay L. Lewis*.

Opinion by MR. CHIEF JUSTICE MOORE.

1, 2. In Oregon a distinction is made between actions at law and suits in equity, the former being designated as an “action” while the latter is called a “suit”: Sections 1, 389, L. O. L. Courts of law and of equity, though presided over by the same judge, have separate jurisdictions, and where there is a remedy at law, a suit in equity must be dismissed: *Abernethy v. Orton*, 42 Or. 437 (71 Pac. 327, 95 Am. St. Rep. 774); *Cohn v. Wemme*, 47 Or. 146 (81 Pac. 981, 8 Ann. Cas. 508); *Chauncey v. Woolenberg*, 59 Or. 214 (115 Pac. 419). After a summons has been issued in an action upon a contract for the direct payment of money, which is not

secured, or in an action upon a contract against a defendant not residing in Oregon, a writ of attachment may be issued as security for the satisfaction of any judgment that may be rendered therein: Section 295, L. O. L. An attachment is an ancillary provisional remedy created by statute, and unless the enactment conferring the privilege upon a plaintiff in an action at law is strictly pursued, no right is thereby acquired: *Schneider v. Sears*, 13 Or. 69 (8 Pac. 841); *White v. Johnson*, 27 Or. 282 (40 Pac. 511, 50 Am. St. Rep. 726); *Dickson v. Black*, 32 Or. 217 (51 Pac. 727); *McDowell v. Parry*, 45 Or. 99 (76 Pac. 1081). A text-writer, in discussing this species of mesne process, by which a writ is issued, commanding the seizure of property to be held as security for the satisfaction of a judgment, observes:

“Nothing more distinctly characterizes the whole system of remedy by attachment, than that it is, except in some states where it is authorized in chancery, a special remedy at law, belonging exclusively to a court of law, and to be resorted to and pursued in conformity with the terms of the law conferring it, and that where, from a conflict of jurisdiction, or from other cause, the remedy by attachment is not full and complete, a court of equity has no power to pass any order to aid or perfect it”: Drake, Attach. (7 ed.), Section 4a.

See, also, *Fischer v. Gaither*, 32 Or. 161 (51 Pac. 736).

3. The principal relief sought herein is the reformation of a deed, a remedy which is peculiar to a court of equity: *Lewis v. Lewis*, 5 Or. 169; *Stephens v. Murtton*, 6 Or. 193; *Ramsey v. Loomis*, 6 Or. 367; *Hyland v. Hyland*, 19 Or. 51 (23 Pac. 811). Whether or not the alleged mutual mistake of the parties to this suit in failing to insert in the covenant of warranty the

defendants' stipulation to pay the expenses of the street improvement, when subsequently levied, was such a mistake of law that a court of equity will correct the blunder is not necessary to a discussion herein. Upon this subject, however, see the extensive notes to the case of *Dolvin v. American Harrow Co.*, 28 L. R. A. (N. S.) 785.

4-7. In any event, this is a suit and not an action, and hence the attachment of the *res* did not confer such a jurisdiction of the real property upon which the writ was levied so as to authorize the court, upon a service of the summons by publication, to condemn the land and order it to be sold to satisfy the sum to be recovered.

The remaining question is whether or not the defendants' appearance in moving to set aside the attempted service of the summons and to dissolve the attachment gave the court jurisdiction of their persons. It seems to be conceded by plaintiffs' counsel that the special appearance was insufficient for that purpose, but he maintains that when the defendants' counsel orally asked for the allowance of costs and disbursements, upon the granting of his motion, a general appearance was thus made, and, this being so, an error was committed in denying the motion to fix the time within which his clients should have been required to answer, demur or plead. Costs are certain sums of money prescribed by statute as indemnity to a party on account of attorney fees in prosecuting a suit or an action or in maintaining a defense therein: Section 561, L. O. L.; *Sommer v. Compton*, 53 Or. 341 (100 Pac. 289). In a suit in equity the allowance of costs is a matter resting in the sound discretion of the court awarding or denying them: Section 567, L. O. L.; *Lovejoy v. Chapman*, 23 Or. 571 (32 Pac. 687); *Cole v.*

Logan, 24 Or. 304 (33 Pac. 568) ; *Fleming v. Carson*, 37 Or. 252 (62 Pac. 374). The statute declares:

“A defendant appears in an action or suit when he answers, demurs, or gives the plaintiff written notice of his appearance”: Section 542, L. O. L.

“A voluntary appearance of the defendant shall be equivalent to personal service of the summons upon him”: Id., § 63.

In *Kinkade v. Myers*, 17 Or. 470 (21 Pac. 557), it was ruled that a special appearance, designating the particular purpose for which it was made, limits the appearance to that distinct matter so specified. In referring to that case, in *Belknap v. Charlton*, 25 Or. 46 (34 Pac. 759), Mr. Justice BEAN remarks:

“The principle to be extracted from the decisions on this subject is that, where the defendant appears and asks some relief which can be granted only on the hypothesis that the court has jurisdiction of the cause and the person, it is a submission to the jurisdiction of the court as completely as if he had been regularly served with process, whether such an appearance by its terms be limited to a special purpose or not.”

In that case, it is further observed:

“A defendant may appear and submit himself to the jurisdiction of the court in many ways, without either answering, demurring or giving plaintiff written notice of his appearance. He may do this by appearing in person, or by attorney in open court, by attacking the complaint by motion, or by an application for a continuance, and in many other ways which will readily suggest themselves to one familiar with the course of judicial proceedings.”

To the same effect, see, also, *Carter v. Koshland*, 12 Or. 492, 498 (8 Pac. 556).

In *Whipple v. Southern Pacific Co.*, 34 Or. 370 (55 Pac. 975), however, it was held that the bodily presence of a defendant by his attorney in a justice's court,

where no written answer was required, was not an appearance within the meaning of our statute: Section 542, L. O. L. The conclusion thus reached is founded upon the decision rendered in the case of *McCoy v. Bell*, 1 Wash. 504 (20 Pac. 595), where a statute almost identical with ours was construed.

“Formerly, an appearance was by actual presence in court, either in person or by attorney, and such appearance still exists in contemplation of law”: 3 Cyc. 503.

In *Rogers v. Penobscot Min. Co.*, 28 S. D. 72, 79 (132 N. W. 792, 795, Ann. Cas. 1914A, 1184, 1187), it is said:

“The test as to whether an appearance is special or general is the relief asked; and in determining the character of an appearance the court will always look to matters of substance rather than to matters of form.”

See, also, the case of *Davis v. Cleveland etc. R. Co.*, 217 U. S. 157 (54 L. Ed. 708, 18 Ann. Cas. 913, 27 L. R. A. (N. S.) 823, 30 Sup. Ct. Rep. 463), where it was held a nonresident whose property had been attached, but who had not been served with process, might appear specially to contest the attachment on the ground that the property was not subject to attachment. Our decisions are to the same effect: *Mayer v. Mayer*, 27 Or. 133 (39 Pac. 1002); *Meyer v. Brooks*, 29 Or. 203 (44 Pac. 281, 54 Am. St. Rep. 790); *Smith v. Day*, 39 Or. 531 (64 Pac. 812, 65 Pac. 1055); *Fildew v. Milner*, 57 Or. 16 (109 Pac. 1092); *Whittier v. Woods*, 57 Or. 432 (112 Pac. 408); *Sit You Gune v. Hurd*, 61 Or. 182 (120 Pac. 737, 1135); *Felts v. Boyer*, 73 Or. 83 (144 Pac. 420). Section 542, L. O. L., expressly prescribes the several ways in which a defendant in a civil action

appears. These specifications impliedly exclude all others.

It is believed the instances suggested, by motion, etc., in *Belknap v. Charlton*, 25 Or. 46 (34 Pac. 759), relate to written applications addressed by a defendant to a court for orders, which solicitations are appearances and equivalent to written notices given to the plaintiff, and that, in the absence of an answer, a demurrer, or some written notice given to the plaintiff or filed in the cause, a defendant or his attorney, though corporeally present in court, has not appeared in the action within the rule prescribed by the enactment. Any other conclusion might give rise to contention between the parties as to what one of them had orally demanded in a case of special appearance, thus leaving in the breast of the court a matter which would be difficult to review on appeal.

In the instant case, the relief desired by defendants' counsel, as indicated by his special appearance in writing, is predicated on the assumption that, neither by the service of the summons by publication, nor by the attachment, did the court secure jurisdiction of the persons of his clients or of their property, and if the inquiry of the counsel, "With costs?" when the court announced its decision, could be construed as a general appearance, where the allowance of costs is a matter of discretion, the phrase did not appear in any writing; and, this being so, no error was committed as alleged.

The action of the court, thus undertaken to be reviewed, should be affirmed; and it is so ordered.

AFFIRMED.

MR. JUSTICE BENSON, MR. JUSTICE BURNETT and MR. JUSTICE MCBRIDE concur.

Argued May 25, reversed June 13, 1916.

ROBINSON v. SCOTT.

(158 Pac. 268.)

Divorce Decree—Property Rights—Extraterritoriality.

1. A decree of divorce rendered in Washington Territory, and subsequently modified by the Superior Court of Pierce County, Washington, when the statute empowered the court to give either spouse any or all of the property in its discretion, conferred upon the wife no title to land which the husband had in Oregon, since the Washington statute was confined in its operation to the property of parties within that state, and the decree did not so operate upon Section 511, L. O. L., relating to the disposition of real property by divorce decrees, as to convey any estate in the Oregon lands, as that provision applies to decrees rendered in Oregon.

Taxation—Assessment—Designation of Owner.

2. An assessment of land to "J. P. Walker and to all owners and claimants known or unknown" was void, and rendered the tax sale and deed void.

Vendor and Purchaser—Bona Fide Purchaser—Actual Notice.

3. Where a vendor, before delivering his deed, fully informed the purchaser of the vendor's contract with a third party and that a deed had been placed in escrow for such third party, the purchaser acquired no interest which he could assert against such party.

Abatement and Revival—Death—Statute.

4. Section 38, L. O. L., made applicable to suits in equity by Section 395, providing that no action shall abate by the death of the party if the cause of action survive or continue, and that in case of the party's death the court may allow the action to be continued against his successor in interest, contemplates the existence and pendency of an action at the time of the death, and did not apply where the party named therein as sole defendant had died several months before the filing of the complaint, as there was then no defendant at all and no action to abate or continue.

Action—Persons Liable—Defendant.

5. The very existence of a cause of suit implies that there is some competent person to be sued, and for that reason a suit cannot be maintained if a defendant is lacking.

Abatement and Revival—Death—Judgment.

6. Where the party named by the complaint as sole defendant died before the filing of the complaint, a judgment against such party would have been a nullity, and the complaint upon which the judgment was based would be as much of a nullity as the judgment itself.

[As to law governing survival of action, see note in *Ann. Cas.* 1914B, 114.]

From Multnomah: CALVIN U. GANTENBEIN, Judge.

Department 2. Statement by MR. JUSTICE HARRIS.

H. N. Scott having filed a disclaimer, the parties who are now waging this contest are the plaintiff, W. M. Robinson, and the defendant, Victor Land Company, a corporation. Robinson and the corporation are each asserting title adverse to the other in two lots in Portland, Oregon, and each is attempting to free such title from certain described clouds. The plaintiff traces his claim of title to two deeds: (1) A quitclaim deed from Walter A. Goss, and (2) a quitclaim deed from Florence C. Roberts, George Rhett Walker and Anne Walker, his wife. The defendant offers to sustain its title with: (1) A quitclaim deed from Helen L. Walker; (2) a bargain and sale deed from Martha Neeley and James Neeley; and (3) a decree against Florence Raymond, George S. Raymond, Rhett G. Walker and Anne Walker. Robinson is attempting to remove the clouds created by the Helen L. Walker deed, the Neeley deed, the decree against Florence Raymond and others, and a quitclaim deed signed by Ernest House and Marie House. The Victor Land Company is striving to dissipate the clouds cast by the deed signed by Florence C. Roberts, George Rhett Walker, and his wife, and the deed given by Walter A. Goss. The story of the title may be written in four chapters: (a) A divorce suit maintained by Helen L. Walker against J. S. Walker, her husband; (b) a tax sale; (c) a decree purporting to quiet the title of the Victor Land Company against Florence Raymond, George S. Raymond, Rhett G. Walker and Anne Walker; and (d) the deed executed by Florence C. Roberts, George Rhett Walker and Anne Walker. The deed from Helen Walker to the company is referable

to the divorce suit. The history of the tax sale includes the deed from Goss to Robinson and the two deeds delivered to the corporation by the Houses and the Neeleys. The decree in the suit prosecuted by the Victor Land Company stands as a chapter by itself, although a discussion of the decree necessarily involves a narrative of the circumstances surrounding the execution of the deed from Florence C. Roberts and others. The four chapters will be recited in the order in which they have already been given. J. S. Walker was the record owner of the lots involved in this suit, and was the husband of Helen L. Walker when, in 1888, she commenced a suit for divorce against him in the District Court for Pierce County, Washington Territory, both parties being residents of Washington Territory; and on November 9th of that year she obtained a decree granting her a divorce, the custody of the children, Florence C. Walker and Rhett G. Walker, and adjudging her the owner of certain real property in Washington Territory. On April 14, 1908, Helen L. Walker caused a guardian *ad litem* to be appointed for J. S. Walker, who was at that time in an insane asylum in Washington, and then on the same day upon her motion the Superior Court for Pierce County, Washington, amended the divorce decree by declaring that Helen L. Walker owned the lots in Oregon. The parties stipulated that:

“The laws of the State of Washington provide that in a suit for the dissolution of the marriage contract, the court is given the power under the statute to give to either spouse any or all of the property, within its discretion.”

Afterward on August 30, 1910, Helen L. Walker quitclaimed the lots to the Victor Land Company. The two lots were assessed for the year 1894 to “J. P.

Walker and to all owners and claimants, known and unknown." The taxes not having been paid, the sheriff sold both lots for a lump sum at a tax sale to Ernest House. House assigned his certificate of sale to W. H. Lutz, who received a tax deed from the sheriff on November 29, 1901. Lutz afterward conveyed to Walter A. Goss, who in turn quitclaimed to the plaintiff on March 15, 1905. Subsequently, on June 30, 1906, the plaintiff quitclaimed to Martha Neeley and James Neeley, but the Neeleys afterward on December 22, 1909, entered into a contract to resell the lots to Robinson, and it was agreed that the latter would be entitled to receive a quitclaim deed, which was in escrow, when all the purchase price was paid. Robinson paid the consideration and obtained the deed on April 17, 1911. The Victor Land Company received a quitclaim deed from Ernest House and wife on November 18, 1899, and a bargain and sale deed from Martha Neeley and James Neeley on March 23, 1911; but when the latter deed was delivered, the company had knowledge of the contract between the Neeleys and Robinson. J. S. Walker died on April 18, 1913. Not knowing of his death, the Victor Land Company commenced a suit to quiet title to the two lots on October 29, 1913, against J. S. Walker in the Circuit Court for Multnomah County, Oregon. An order was made for the publication of summons, but shortly afterward the Victor Land Company filed an affidavit, averring that "J. S. Walker died since the commencement of this suit," and that the only heirs at law are Rhett G. Walker and Florence C. Raymond, and that Anne Walker is the wife of Rhett G. Walker while George S. Raymond is the husband of Florence C. Raymond. On December 8, 1913, the court ordered:

"That said Rhett G. Walker and Anne Walker, his wife, Florence C. Raymond and George S. Raymond,

her husband, be, and they are hereby, substituted and made defendants in this suit in place of J. S. Walker, and it is hereby ordered by the court that the names of said substituted parties be written in and placed in the complaint in this suit."

The names of the substituted defendants were written in the title only of the complaint which had been filed against J. S. Walker, but otherwise that pleading remained exactly as it was when originally filed. On January 26, 1914, the court ordered that the summons be served on the substituted defendants by publication in a newspaper. The summons was entitled against "J. S. Walker, Defendant Florence C. Raymond, George S. Raymond, Her Husband, Rhett G. Walker and Anne Walker, His Wife, substituted for J. S. Walker, Defendants." It was addressed, "To Florence Raymond, George S. Raymond, Rhett G. Walker and Anne Walker, the above-named Defendants," and it advised the defendants that the Victor Land Company intended to apply for a decree adjudging the corporation to be the owner of the lots and barring the defendants from asserting any claim in the land. The summons was published and a copy of it, together with a copy of the "complaint herein," were "mailed to each of said defendants at their postoffice address." None of the defendants appeared in the suit, and consequently on March 19, 1914, the court entered the default of the substituted defendants, and decreed that the Victor Land Company was the owner of the land as against those defendants. On March 19, 1914, the same day that the decree was rendered, "Florence C. Roberts, widow, and George Rhett Walker, his wife, the heirs at law of Johnson S. Walker, deceased, executed a quitclaim deed" to Arthur L. Pressy, who was really a trustee for W. M. Robinson, and then Pressy

quitclaimed to Robinson on March 23, 1914. After a trial the Circuit Court decreed the Victor Land Company to be the owner in fee simple of the lots, and declared that W. M. Robinson possessed no interest in the property. The plaintiff appealed.

REVERSED. DECREE RENDERED.

For appellant there was a brief over the names of *Mr. Edward A. Lundburg* and *Mr. C. O. Garmire*, with an oral argument by *Mr. Lundburg*.

For respondent there was a brief and an oral argument by *Mr. Frank Schlegel*.

MR. JUSTICE HARRIS delivered the opinion of the court.

1. Neither the decree of divorce rendered in Washington Territory nor the subsequent modification of that decree by the Superior Court of Pierce County, Washington, conferred upon Helen L. Walker any title which her husband had to land in Oregon, and consequently the quitclaim deed which Helen L. Walker made to the Victor Land Company on August 30, 1910, was worthless, for the reason that she had no interest to convey. The divorce decree which Helen L. Walker obtained in Washington did not so operate upon Section 511, L. O. L., as to convey to her any estate in the Oregon land, because that provision of the Code applies to decrees rendered in Oregon: *Barrett v. Failing* (C. C.), 3 Fed. 471 (6 Sawy. 473); *Barrett v. Failing*, 111 U. S. 523 (28 L. Ed. 505, 4 Sup. Ct. Rep. 598). While it is true that the law of Washington authorizes a court of that state to "give to either spouse any or all of the property," still the Washington court was without power to pass to Helen

L. Walker the title to land in Oregon, because the Washington statute is "confined in its operation to the property of the parties within that state: *Barrett v. Failing* (C. C.), 3 Fed. 471, 477 (6 Sawy. 473, 480); 14 Cyc. 728; 23 Cyc. 1548.

2. None of the deeds which trace their origin to the tax sale transferred any title. Applying the doctrine announced in *Lewis v. Blackburn*, 42 Or. 114 (69 Pac. 1024), where the court was governed by the same statutes which existed when the instant tax sale was made, the tax deed given by the sheriff to W. H. Lutz was void, because it showed on its face that the assessment had been made to "J. P. Walker and to all owners and claimants, known or unknown": *Stitt v. Stringham*, 55 Or. 89, 93 (105 Pac. 252); *Crane v. Oregon R. & N. Co.*, 66 Or. 317, 326 (133 Pac. 810); *Martin v. White*, 53 Or. 319, 323 (100 Pac. 290); *Grotefend v. Ultz*, 53 Cal. 666; *Grimm v. O'Connell*, 54 Cal. 522; *Russ & Sons Co. v. Crichton*, 117 Cal. 695 (49 Pac. 1043). The quitclaim deed executed on March 15, 1905, by Walter A. Goss to Wm. M. Robinson therefore failed to transfer any title to the lots. The deed which the Houses made to the Victor Land Company on November 18, 1899, was inoperative, not only because the tax sale was affected by a fatal error, but also for the reason that the Houses had previously transferred all their interest to Lutz.

3. The corporation acquired no interest which it can assert against Robinson when the Neeleys made a deed to the Victor Land Company on March 24, 1911, because before delivering the instrument the Neeleys fully informed the company of the contract with Robinson and the deed which had been placed in escrow for him: *Musgrove v. Bonser*, 5 Or. 314 (20 Am. Rep. 737); *Victor Land Co. v. Drake*, 63 Or. 210 (127 Pac.

27). Even though it be assumed that the tax deed was valid, nevertheless the Victor Land Company received nothing from the deed made by the Houses, because they had already conveyed to Lutz and had nothing left to transfer to the corporation, and the company gained nothing from the deed made by the Neeleys, for the reason that they notified the company of the transaction with Robinson; and therefore, if it be assumed that the tax sale was valid, the Victor Land Company profited nothing from it, while the plaintiff acquired title when he received the deed from Goss, and, having parted with such title by delivering the deed to the Neeleys, he nevertheless reacquired the same title when he afterward received a deed from the Neeleys.

The quitclaim deed made on March 19, 1914, to Arthur L. Pressy by Florence C. Roberts, George Rhett Walker and Anne Walker, "as heirs at law of Johnson S. Walker, deceased," may be considered along with the decree which was rendered on the same day against Florence Raymond, George S. Raymond, Rhett G. Walker and Anne Walker. While there is a dissimilarity between the names, excepting that of Anne Walker, found in the deed and those appearing in the decree, still if we assume that the persons who signed the deed are all included in the decree, then it will follow that if the decree is valid, the deed conveyed nothing, but if the decree is ineffective, the deed transferred the land: *Jennings v. Kiernan*, 35 Or. 349 358 (55 Pac. 443, 56 Pac. 72). It sufficiently appears that the signers of the deed are the heirs at law of J. S. Walker, and for the purposes of this discussion we shall assume that they are also among the defendants mentioned in the decree. In passing, but without deciding its effect, we call attention to the fact that the complaint upon which the decree was rendered only

mentions the heirs in the title of the cause, while their names nowhere appear in the body of the complaint, so that if the pleading were stripped of its title, it would contain no intimation of a suit against anyone except J. S. Walker, and it would only inform the reader that the plaintiff owned the land, that the defendant J. S. Walker claimed some interest without right, and that the plaintiff prays for a decree to the effect that plaintiff owns the property, and that "the defendant" has no interest whatever.

4-6. It will be recalled that J. S. Walker died on April 18, 1913, and that the Victor Land Company did not commence the suit until several months afterward, the complaint having been filed on October 29, 1913. Robinson argues that the suit was a nullity because commenced against a dead man, while the company contends that the court had jurisdiction to substitute the heirs for the dead ancestor. Both litigants rely upon *White v. Johnson*, 27 Or. 282 (40 Pac. 511, 50 Am. St. Rep. 726), to support their variant conclusions. A. H. Johnson, the original defendant in that case, was a living person at the time of the filing of the complaint, although he died soon afterward without having been served with summons. The facts and principles involved in that action were so materially different from the situation presented by the instant suit that no statement made there is decisive here; nor is much aid to be derived from the sequels to *White v. Johnson*, found in *White v. Ladd*, 34 Or. 422 (56 Pac. 515), and *White v. Ladd*, 41 Or. 324 (68 Pac. 739, 93 Am. St. Rep. 732).

Section 38, L. O. L., made applicable to suits by Section 395, L. O. L., provides that no action shall abate by the death of a party if the cause of action survive or continue; and, in case of the death of a party, the

court may, within one year thereafter, on motion, allow the action to be continued against his successor in interest. Section 38 plainly contemplates the existence and pendency of an action at the time of the death, and unless such action has already been commenced, that section has no application. It speaks of the abatement of an action as distinguished from a cause of action. If an action or proceeding has been commenced on a cause of action, then the action or proceeding may be continued if a party dies and the cause of action survives.

When the complaint was filed it named J. S. Walker as the sole defendant, but he had died several months before the filing of the complaint, and consequently there was in reality no defendant at all. The very existence of a cause of suit implies that there is some competent person to be sued, and for that reason a suit cannot be maintained if a defendant is lacking: 1 C. J., p. 982, § 84; *Fruitt v. Anderson*, 12 Ill. App. 421; *In re Hurst Home Ins. Co.*, 23 Ky. Law Rep. 940 (64 S. W. 512); *Green v. McMurtry*, 20 Kan. 189. There was no existing defendant at the time the complaint was filed, and therefore there was no action to abate or to continue or to which Section 38 could be applied: *Crowdus' Admr. v. Harrison*, 9 Ky. Law Rep. 58. A judgment against J. S. Walker would have been a nullity (*Hurst v. Fisher*, 1 Watts & S. (Pa.) 438; *Humphreys v. Irvine*, 14 Miss. (6 Smedes & M.) 205; *Service Lumber Co. v. Sumpter Valley Ry. Co.*, *post*, p. 32 (152 Pac. 262, 265); 1 C. J., p. 136), and the complaint upon which judgment was based would be as much of a nullity as the judgment itself. Since there was no action, there was nothing to amend or continue: *Brooks v. Boston & Northern Street Ry.*, 211 Mass. 277 (97 N. E. 760); *Ex parte Collins*, 49 Ala. 69; *Proprietors*

of Mexican Mill v. Yellow Jacket Silver M. Co., 4 Nev. 40 (97 Am. Dec. 510). When the complaint was filed the Victor Land Company had a cause of suit against the heirs, and not against the ancestor, because the death of the latter operated to transfer to the heirs any interest which J. S. Walker may have had in the land at the time of his death. It is true that this complaint recited a name as a defendant, but that name only signified a memory, because it had ceased to represent a living person. It was impossible for the Victor Land Company to sue a memory or to litigate with a corpse. No suit was pending because there was no defendant. There was nothing to amend or to build upon. The attempted proceeding against the ancestor was a nullity, and the decree against the heirs was no better. The decree against the heirs not being valid, it necessarily follows that the Victor Land Company fails in this suit, and the plaintiff prevails. The decree of the Circuit Court is reversed, and the plaintiff is granted the relief prayed for in the complaint.

REVERSED. DECREE RENDERED.

MR. CHIEF JUSTICE MOORE, MR. JUSTICE BEAN and MR. JUSTICE McBRIDE concur.

Motion to recall mandate denied June 20, 1916.

IN RE TROY.

BEEM v. MAYES.

(158 Pac. 172.)

From Union: GUSTAV ANDERSON, Judge.

This hearing is upon a motion to recall the mandate heretofore issued in this cause. For former opinion, see 79 Or. 247 (152 Pac. 103). MOTION DENIED.

There was a brief submitted over the names of *Mr. Turner Oliver* and *Mr. Joel H. Richardson*, in support of the motion.

Contra, there was a brief and an oral argument by *Mr. Francis S. Ivanhoe*.

In Banc. MR. JUSTICE HARRIS delivered the opinion of the court.

The decree rendered by the trial court was affirmed on December 28, 1915: *Beem v. Mays*, 79 Or. 247 (152 Pac. 103). An exhaustive petition for a rehearing was filed on January 27, 1916, but after carefully re-examining the objections made to the final account of the guardian we again arrived at the same conclusion reached by the circuit judge, and denied the petition for a rehearing on February 15, 1916, and on the next day our mandate was issued. The appellants afterward filed a motion to recall the mandate.

The arguments advanced in support of the motion are substantially a restatement of the contentions which were presented at the first hearing and repeated in the petition for a rehearing; and although the motion to recall the mandate is in effect a second motion for a rehearing, we have nevertheless yielded to the earnest insistence of appellants, and for the third time have examined the record, with the result that we come to the same conclusions as before. The guardian was careless in keeping his accounts in a loose and slipshod manner, and, as suggested by the findings of the circuit judge, this carelessness made litigation inevitable; and yet, on the whole record, we think the decree appealed from strikes a correct balance.

The motion to recall the mandate is denied.

MOTION DENIED.

Argued May 6, dismissed June 15, 1915.

Petition for rehearing allowed October 22, 1915.

Motion to dismiss overruled, and judgment rendered November 3, 1911,
reversed and remanded June 20, 1916.

SERVICE LUMBER CO. v. SUMPTER VALLEY RY. CO.*

(149 Pac. 531; 152 Pac. 262; 158 Pac. 175.)

Corporations—Dissolution—Existence for Purpose of Bringing Suit— Statute.

1. Under Section 6699, L. O. L., providing that after dissolution all corporations shall continue to exist as bodies corporate for five years if necessary to prosecute or defend suits, or settle their affairs, an action by a corporation which had taken the statutory steps for a voluntary dissolution, tried after the expiration of the five-year period, was abated.

Appeal and Error—Former Decision—Matters Concluded.

2. A judgment on defendant's appeal from a judgment for plaintiff corporation rendered within five years allowed to a corporation after its dissolution for the purpose of bringing suits, etc., appealed on the ground of error in refusing an instruction that if plaintiff had been dissolved before commencing the action it could not maintain it, and reversing and remanding for a new trial after the lapse of such five-year period, was not conclusive on defendant's second appeal on the ground that the action was abated because the five-year period had expired at the time of the second trial.

Abatement and Revival—Dissolution—Actions.

3. Where corporation's cause of action accrued one year prior to voluntary dissolution of the corporation, but action was not brought for two years after such dissolution, and the cause was pending in a lower court after reversal of judgment on appeal, at the end of the five-year period allowed by Section 6699, L. O. L.; to dissolved corporations for defending or prosecuting actions, the right to continue the prosecution in the name of the corporation ceased, and the corporation was absolutely defunct beyond the five-year limit, so that the action should abate.

Abatement and Revival—Prosecution—Commencement—"Prosecute."

4. To "prosecute" an action is not merely to commence it, but includes following it to an ultimate conclusion, so that under Section 6699, L. O. L., commencement of an action by a dissolved corporation

*As to effect on pending actions of statutory period permitting litigation of corporations after dissolution, see note in 32 L. R. A. (N. S.) 452.

For authorities passing upon the question as to whether corporation or stockholder is real party in interest by whom action must be brought, see note in 64 L. R. A. 609.

before the expiration of the five-year limit does not extend the limit until final determination of the cause.

[As to when an action may be said to be pending, see note in Ann. Cas. 1912A, 843.]

Corporations—Dissolution—Prosecution of Actions—Judgment After Expiration of Time Limit.

5. Where a judgment of reversal is rendered by Supreme Court in an action by a dissolved corporation, after the expiration of the five years allowed by Section 6699, L. O. L., for the prosecution of such actions, the judgment is void, and on a second appeal the hearing is upon the original appeal as if no judgment had been rendered.

Appeal and Error—Parties—Death—Substitution—Time.

6. Where motion is made to substitute parties plaintiff, the original plaintiff corporation being defunct, it is not necessary that such motion be made within one year, as required by Section 38, L. O. L., if the appeal has been taken before the disability arises.

Corporations—Dissolution—Title to Corporate Property.

7. The stockholders of a defunct corporation, in the absence of creditors, are vested with title to the corporate property as tenants in common.

Corporations—Parties—Stockholders of Defunct Corporation.

8. Under Section 27, L. O. L., requiring that every action be prosecuted in the name of the real party in interest, except as provided in Section 29, the stockholders of a defunct corporation having no creditors are proper parties plaintiff in an action to enforce a corporate claim.

Corporations—Dissolution—Action—Parties—Substitution.

9. Stockholders of a defunct corporation may be substituted as parties plaintiff in an action where an appeal has been taken before dissolution of the corporation without the necessity of making motion for such substitution within one year after the dissolution of the corporation as required by Section 38, L. O. L.

From Baker: DALTON BIGGS, Judge.

In Banc. Statement by MR. JUSTICE BENSON.

This action by the Service & Wright Lumber Company, a corporation, against the Sumpter Valley Railway Company, a corporation, was begun on September 11, 1909, and after trial a judgment was duly made and entered in favor of plaintiff on November 3, 1911. Thereafter an appeal was taken to this court, being perfected on April 29, 1912. On September 30, 1913, this court handed down a decision reversing the

judgment: *Service Lumber Co. v. Sumpter Valley Ry. Co.*, 67 Or. 63 (135 Pac. 539). One of the issues raised by the answer and reply in the first trial was the contention of defendant that the plaintiff, having accomplished a voluntary dissolution on May 6, 1907, had no power to institute this action. The cause coming on for retrial upon the remand from this court defendant, by leave of the trial court, filed an amended answer, one of which amendments pleaded in effect that the five years allowed to plaintiff by Section 6699, L. O. L., in which to wind up its corporate affairs had expired and that therefore the action had abated.

Plaintiff's demurrer to this defense was sustained. The cause then proceeded to trial upon the issues as joined before the first trial. A judgment was duly entered on January 9, 1914, in favor of plaintiff, and defendant appeals.

ACTION DISMISSED.

For appellant there was a brief over the names of *Mr. John L. Rand* and *Messrs. Snow & McCamant*, with oral arguments by *Mr. Rand* and *Mr. Zera Snow*.

For respondent there was a brief with oral arguments by *Mr. Robert Service* and *Mr. Samuel White*.

MR. JUSTICE BENSON delivered the opinion of the court.

1. In the appellant's abstract of record we find some 17 assignments of error, but we shall consider one question only, and that is as to whether or not at the time of the trial the plaintiff's right of action had abated. We conclude that it had, and it remains only to give our reasons for such conclusion. The plaintiff corporation on May 6, 1907, took such steps as are prescribed by statute for a voluntary dissolution. This was done, doubtless, in order to avoid the

burdens of annual reports and the payment of annual license fees. Section 6699, L. O. L., is as follows:

“All corporations that expire by limitation specified in their articles of incorporation, or are dissolved by virtue of the provisions of Section 6701, or are annulled by forfeiture or other cause by the judgment of a court, continue to exist as bodies corporate for a period of five years thereafter, if necessary for the purpose of prosecuting or defending actions, suits or proceedings by or against them, settling their business, disposing of their property, and dividing their capital stock, but not for the purpose of continuing their corporate business.”

As to the effect of this statute in a case like the one at bar it is said in the case of *Dundee Mortgage & Trust Investment Co. v. Hughes* (C. C.), 77 Fed. 856:

“In some of the states where the corporate existence is so extended by statute, express authority is given to prosecute to a final judgment all actions begun by the corporation within the limited period: *Franklin Bank v. Cooper*, 36 Me. 179; *Greenbrier Lumber Co. v. Ward*, 30 W. Va. 43 (3 S. E. 227). Under such a law was decided the case of *Bewick v. Alpena Harbor Imp. Co.*, 39 Mich. 700, which is cited by counsel for the plaintiff. In that case the court held that the corporation might prosecute to a close any action commenced within the three-year period of limitation fixed by the statute, but in so holding gave effect to another provision of the law upon the same subject, which provided that no such suit, once commenced, should become abated at any time until brought to a close. There is no such or similar provision in the Oregon law. The statute of this state gives a bare extension of life for a fixed period after the dissolution of the corporation. Without the statute, as we have seen, by the common law, all corporations were defunct from the moment of their dissolution. The statute extends their existence for a further period for a stated purpose. At the expiration of that period it is the logic of the common-law rule that the corporation is as absolutely defunct

as it would have been in the first instance had not its life been prolonged by the intervention of the statute. The Supreme Court of Massachusetts has held that a judgment recovered against a corporation after the expiration of a similar period of limitation is absolutely void: *Thornton v. Marginal Freight Ry. Co.*, 123 Mass. 32."

The doctrine here expressed appears to be in accord with the great weight of authority: 10 Cyc. 1314; 5 Thompson on Corporations, §§ 6550, 6555; *MacRae v. Kansas City Piano Co.*, 69 Kan. 457 (77 Pac. 94); *Buck Stove etc. Co. v. Vickers*, 80 Kan. 29 (101 Pac. 668); *May v. North Carolina St. Bank*, 2 Rob. (Va.) 60 (40 Am. Dec. 726); 1 C. J. 134; 7 R. C. L., §§ 750, 751. This doctrine, it is true, may work hardship in the individual case, but it must not be forgotten that in the case at bar the dissolution of the corporation was voluntary, and no doubt the stockholders weighed the resulting advantages as against the consequent disabilities, so they cannot now complain.

2. It is contended with great earnestness and ability by counsel for plaintiff that the same question was before this court in the former appeal herein (67 Or. 63 (135 Pac. 539)), and that the fact that the cause was remanded for a new trial after the lapse of the five-year period is conclusive upon the question. However, we cannot agree with counsel in this. The judgment first appealed from was rendered within the five-year period, and the only assignment of error relating thereto that was then presented was in the following words:

"The court erred in refusing to give the instruction requested by the defendant to the effect that as the plaintiff had been disincorporated prior to the commencement of the action, there was no evidence justifying the plaintiff in maintaining the action and that plaintiff could not recover."

This assignment simply calls attention to the fact that the action was commenced after the dissolution, and that was the only matter germane to the present discussion which was then submitted or considered. At the time the first judgment was rendered the lapse of the five-year period was not an issue, and could not be, for no such lapse had then occurred. It follows that the action must be dismissed.

ACTION DISMISSED.

MR. JUSTICE BEAN dissents.

Petition for rehearing allowed October 22, 1915.

PETITION FOR REHEARING.

(152 Pac. 262.)

On petition for rehearing the opinion and judgment on former appeal (67 Or. 63 (135 Pac. 539), set aside, substitution of parties allowed, and cause is ordered to stand for rehearing on original appeal.

REHEARING ALLOWED.

Mr. Samuel White, Mr. Charles W. Fulton and Mr. Robert Service, for the petition.

Mr. John L. Rand and Messrs. Snow & McCamant, contra.

In Banc. MR. JUSTICE McBRIDE delivered the opinion of the court.

In a petition for rehearing remarkable for its ability and plausibility, plaintiff questions the soundness of the original opinion dismissing this case. A brief *résumé* of the circumstances leading up to such dis-

missal is not inappropriate: On May 3, 1907, the plaintiff corporation passed a resolution to dissolve, which was accepted by the Secretary of State on the seventh day of the same month, and a certificate issued upon that day dissolving the corporation. Plaintiff's cause of action accrued May 27, 1906, nearly a year previous to the resolution dissolving the corporation, and this action was commenced in September, 1909, over three years after the right to bring it had accrued and over two years after the corporation had voluntarily dissolved. The plaintiff recovered a judgment, from which defendant appealed to this court, where the same was reversed for material error and a new trial ordered; the opinion being handed down September 30, 1913: 67 Or. 63 (135 Pac. 539). Before the new trial was had defendant filed a plea in abatement setting up the fact that more than five years had elapsed since the dissolution of the corporation, and that by the terms of Section 6699, L. O. L., the plaintiff corporation had ceased to exist for any purpose, and was therefore incapable of further prosecuting this action. This plea being overruled, the trial proceeded, and, the plaintiff having again recovered a judgment, an appeal was taken to this court, where defendant's plea was held good and an order of dismissal made: 149 Pac. 531. The petition for rehearing presents the following propositions: (1) That Section 6699 should be construed to allow this action, commenced within the five-year period, to be prosecuted to an end even after the termination of the five-year period; (2) that, should the court refuse so to construe Section 6699, the court should permit the action which abated at the end of the five-year period to be revived and further prosecuted, with the substitution in place of plaintiff of stockholders in plaintiff corporation, or a receiver of the plaintiff corporation to be appointed by the court;

(3) that, should the court refuse such substitution, it should hold that the first *nisi prius* judgment is still in force.

3. As to the first proposition a careful review of the authorities only strengthens our conviction that it is impossible for the court to adopt the view taken by the learned counsel for plaintiff without deliberately disregarding the terms of the statute. Upon the certificate of dissolution being issued, the corporation is as dead as though it had never existed, except for the purpose of prosecuting or defending actions and suits against it, settling its business, disposing of its property, and dividing its capital stock, and for these purposes a further grace of five years is allowed, and there its functions cease absolutely. Seeking diligently to find authority that would give plaintiff the right to have its case heard fully upon the merits on this appeal, we have found none under a statute like ours, and counsel have cited us to none. The case of *Williamet Falls C. & L. Co. v. Kittridge*, 29 Fed. Cas. 85, No. 17,105, is not in point, because in that case the five years allowed to a corporation in which to wind up its business had not expired when the plea in abatement was filed, and there is, therefore, no conflict between that decision and the opinion of Judge GILBERT in *Dundee Mortgage & Trust Investment Co. v. Hughes* (C. C.), 77 Fed. 855. The construction placed upon the statute by counsel would be subversive of the very purpose as well as the language of the law, in that, where the statute says that a dissolved corporation shall have five years within which to prosecute or defend actions, counsel's construction would extend the period indefinitely if the action or suit were commenced a single day before the five-year limitation expired. The authorities, as shown by Justice BENSON,

are practically unanimous in favor of the view taken in the original opinion; nor is this rule necessarily harsh or unjust. In the case at bar the corporation voluntarily dissolved after its cause of action had accrued, thereby avoiding for five years the burden of paying to the state the annual license fee and making the annual statements required by Section 6707, L. O. L., and thereafter delayed for more than two years the institution of the present action. This does not present the same equitable features which would appear had the dissolution been involuntary, or where the action had been begun promptly after the right to institute it accrued. The plaintiff having availed itself of the benefits of a dissolution, cannot complain if it is required to submit to the hardships imposed by statute under such circumstances. It also had another remedy. It could at any time within the five-year period allowed for winding up its business have assigned its cause of action to its stockholders or to some other person, and the action could then have been carried on in the name of such assignee for the benefit of its stockholders. Not having done this, its right of action is completely lost. So far as the present appeal is concerned, it is a dead corporation. Should this court affirm the judgment on the merits, plaintiff could no more order an execution or dispose of the judgment than a man in his grave could transact the same business. The consequences of the voluntary extinction of a corporation at common law are succinctly stated in *Fox v. Horah*, 36 N. C. 358 (36 Am. Dec. 48), in the following language:

“The real estate remaining unsold reverts to the grantor and his heirs, ‘because [in the language of Lord Coke] in the case of a body politic or incorporate the fee is vested in their political or incorporate capacity, created by the policy of man, and therefore the

law doth annex a condition in law to every such gift and grant that, if such body politic or incorporate be dissolved, the donor or grantor shall re-enter, for that the cause of the gift or grant faileth': Co. Litt. 136. Goods and chattels, by the common law, were deemed of too transitory and fluctuating a nature to be susceptible of reversionary interests after an estate for life, and, on the death of a corporation, they do not revert to the grantor or donor, but, being *bona vacantia*, or goods wanting an owner, they vest in the sovereign, as well to preserve the peace of the public as in trust to be employed for the safety and ornament of the commonwealth. Choses in action are under the operation of a different rule. They were rights of the corporation to demand money in the hands of persons by whom it was withheld. They derived their existence from contracts or *quasi* contracts by which the relation of debtor and creditor was created. When the creditor corporation died, and there was no successor, no representative, the relation of debtor and creditor ceased, and the debt became necessarily extinct. None but the creditor had a right to demand the money, and when his right is gone, the money becomes to all purposes the money of the possessor."

These rules have been, however, materially modified by statutes of the various states, and in some instances by judicial decisions without the aid of statutes, so that it may be taken to be the general rule that upon the extinction of a corporation by voluntary dissolution its real and personal property and assets become the property of the stockholders, but the corporation, as such, does not remain alive for any purpose beyond the limit of five years.

4. Section 6699, L. O. L., is as follows:

"All corporations that expire by limitation specified in their articles of incorporation, or are dissolved by virtue of the provisions of Section 6701, or are annulled by forfeiture or other cause by the judgment of a court, continue to exist as bodies corporate for a period of five years thereafter, if necessary for the

purpose of prosecuting or defending actions, suits or proceedings by or against them, settling their business, disposing of their property, and dividing their capital stock, but not for the purpose of continuing their corporate business.”

Counsel for plaintiff contend that the word “prosecute” means to commence, and in this connection cites *Hickox v. Elliott* (C. C.), 22 Fed. 13, in which Judge DEADY, construing the statute which requires that “every action shall be prosecuted in the name of the real party in interest,” observes:

“In my judgment, the term ‘prosecuted’ is used in this section in the sense of ‘commenced,’ and does not prevent a party from assigning his interest in the subject matter of an action after it has been duly commenced, or require that the assignee shall make himself a party thereto, or dismiss the same and commence another action in his own name. And so the provision appears to have been construed in *Garrigue v. Loescher*, 3 Bosw. (N. Y.) 578, cited in Wait’s Annotated Code, 115.”

Judge DEADY was evidently misled by an erroneous statement as to the effect of the decision in *Garrigue v. Loescher*, which holds only that an assignee of a chose in action may sue in his own name, and, further, that having sued in his own name, he cannot sustain his title by evidence of an assignment made after he has commenced his action.

In *Hickox v. Elliott* (C. C.), 22 Fed. 13, the court was dealing with a living plaintiff and a living assignee of that plaintiff, and there can be little doubt that, if the case had presented the aspect of a plaintiff who had assigned his claim and thereafter died, the court would have abated the suit, or upon a proper showing have directed a substitution. Here we have a case carried on in the name of a plaintiff who is absolutely extinct for any purpose whatever, with no substitu-

tion asked until the present petition for rehearing was filed. While the word "prosecute" may comprehend the commencement of an action, it includes more. To prosecute an action means not only to file a complaint and serve a summons, but it necessarily includes the carrying on of the action to some conclusion. The following cases, in addition to those cited in the original opinion, bear out the conclusion herein reached: *Marryott v. Young*, 33 N. J. Law, 336; *Cohens v. Virginia*, 19 U. S. (6 Wheat.) 264 (5 L. Ed. 257); *Inhabitants of Knowlton Township v. Read*, 11 N. J. Law, 320; *State v. McDonald*, 2 N. J. Law, 355, 360; *Territory v. Nelson*, 2 Wyo. 346; *Inhabitants of Great Barrington v. Gibbons*, 199 Mass. 527 (85 N. E. 737). And see generally Words and Phrases, title "Prosecute," every case there cited having been carefully examined by this court.

Reason also supports this construction of our statute, which was evidently designed to remedy the harshness of the common-law rule abating every action and destroying all rights of recovery on behalf of a corporation the moment it became dissolved. Instead of this, the statute allows five years as a reasonable time within which all actions may be brought to a conclusion and the proceeds from them or the judgments themselves be disposed of to the advantage of stockholders and creditors. That the plaintiff, with a large claim against defendant, should have voluntarily dissolved, leaving it unliquidated, or, having dissolved, allowed two of the five years limitation to expire before commencing its action, is certainly due to no harsh feature of the law. It is clear that, had this action been commenced when the cause accrued, or even when the dissolution took place, plaintiff would have had ample time to have concluded it before the expiration of the five years allowed for that purpose. Consequently,

while we deplore the necessity for so doing, we cannot extend the time allotted by statute to meet the peculiar exigencies of this case any more than we could allow an action upon a promissory note to be commenced seven years after the cause of action accrued, instead of the six years prescribed by statute, because it appeared that the payor of the note actually owed the money, nor can this court at this time allow a substitution so as to preserve plaintiff's present judgment.

5. There was no plaintiff when the first appeal was heard, and it was the duty of one party or the other to have called that fact to the attention of the court and asked for substitution, which would have given the defendant a good judgment of reversal, and, perhaps, incidentally have kept the cause alive for a new trial. This was not done, and our judgment of reversal was an absolute nullity. The case stands here upon the appeal from the first judgment of the Circuit Court just the same as if no judgment of this court reversing the case had been rendered: *Young's Estate*, 59 Or. 348, 363 (116 Pac. 95, 1060, Ann. Cas. 1913B, 1310). The logical result of the reasoning of defendant's counsel, however, cuts both ways. If the present proceeding is void because there was no plaintiff in existence when the case was tried and the judgment rendered, it follows that there was no valid appeal from the second judgment for the same reason. That being so, the appeal should be dismissed, but it also follows that, as there was no plaintiff when the former appeal was heard, and no substitution asked or granted, the judgment of reversal was void and an absolute nullity, and in such a case the judgment should be set aside; it being always in the power of the court to purge its records of a void judgment.

6. The attorney for plaintiff has appeared for the stockholders and asked that they be substituted as par-

ties upon the original appeal and the cause reinstated. It is claimed by defendant that no substitution can be had in this case, because no motion therefor was made within one year, as required by Section 38, L. O. L.; but in *Long v. Thompson*, 34 Or. 359 (55 Pac. 978), it was held that this section did not apply to a case where the death or disability occurred after an appeal had been taken to this court.

The petition for substitution should be allowed, and our former opinion reversing the first judgment set aside. The matter will then stand for hearing upon the original appeal.

An order will be entered accordingly.

REHEARING ALLOWED.

MR. JUSTICE BURNETT delivered the following dissenting opinion:

It seems illogical to hold that the only means by which the defendant can bring to the attention of the court the fact that the plaintiff corporation is *functus officio* and so abate the action, five years having elapsed since the corporate dissolution, is first to cause the substitution of the stockholders by whom the action may be perpetuated. The principle embodied in Section 6699, L. O. L., is that at the end of the five-year period mentioned, the existence of the artificial being called a corporation ceases. It does not die; neither has it any inheritable blood. It is a conventional institution devised by its component stockholders to serve their purposes, and its use by them is controlled and circumscribed by the law, which automatically puts a quietus upon their creature at the expiration of the five years. It is true that as between it and them its property belongs to them, but it is equally true that the transposition from corporate to individual title as affecting other parties must be worked out through corporate

action while it is still permissible. It seems to be contemplated by the law that the transmission of title is to be accomplished by assignment, for Section 6725, L. O. L., reads thus:

“Suits and actions upon choses in action arising out of contracts sold or assigned by any corporation dissolved by this act may be brought or prosecuted in the name of the purchaser or assignee. The fact of sale or assignment and of purchase by the plaintiff shall be set forth in the writ or other process; and the defendant may avail himself of any matter of defense of which he might have availed himself in a suit upon the claim by such corporation, had it not been dissolved by this act.”

The stockholders do not inherit from their creature. They perpetuate or dissolve it at pleasure, and if they do not acquire title to its choses in action while yet it may transmit it, they have no cause of complaint, because they have control of the situation up to the limit of five years which they have brought upon themselves. Beyond that it is inert, and cannot be counted upon for any purpose. Otherwise the statute would be ignored, and the corporation prolonged indefinitely. The matter involved stood undenied on the record, and upon the bare suggestion of the fact the court of its own motion ought to have abated the action as it would one on the death of a natural plaintiff where the cause of action does not survive.

For these reasons, I withhold my assent to the conclusion reached by Mr. Justice McBRIDE.

Judgment rendered November 3, 1911, reversed and remanded June 20, 1916.

REHEARING ON ORIGINAL APPEAL,

(158 Pac. 175.)

From Baker: WILLIAM SMITH, Judge.

On motion for rehearing and to dismiss appeal. Motion denied and judgment rendered November 3, 1911, reversed and cause remanded for a new trial.

REVERSED AND REMANDED.

Mr. Samuel White, Mr. Robert Service and Mr. Charles W. Fulton, for the motion.

Mr. John L. Rand, Messrs. Snow & McCamant and Mr. MacCormac Snow, contra.

In Banc. MR. JUSTICE BEAN delivered the opinion of the court.

After the opinion rendered in this case by Mr. Justice McBride on October 22, 1915, counsel for defendant submitted a motion to dismiss the cause and questioned the authority of the court to substitute the stockholders of the plaintiff corporation as parties plaintiff.

In its motion the defendant raises two main questions, namely:

(1) "Substitution is unknown except in cases where legal title to the interest of a party in the subject matter of a suit descends and devolves, upon the death of the party, upon the person to be substituted; and the assets, whether realty, personalty or choses in action, of a corporation, do not pass at law on the dissolution of the plaintiff to the stockholders; (2) substitution cannot be permitted except by statute, and there is no statute in Oregon permitting the substitution of stock-

holders in place of a corporation which dies pending suit to which it is a party.”

It is contended in behalf of plaintiff that upon the death of the corporation without creditors, and without provision being made for the distribution of its assets, the same descends by operation of law to the stockholders, who are the beneficiaries under the trust, and the only persons who have any interest in the property, and that thereby the stockholders become tenants in common of the corporate property and are entitled to all the remedies that the latter have in asserting their ownership to such property.

Section 38, L. O. L., declares that:

“No action shall abate by the death, marriage, or other disability of a party, or by the transfer of any interest therein, if the cause of action survive or continue. In case of the death, marriage, or other disability of a party, the court may, at any time within one year thereafter, on motion, allow the action to be continued by or against his personal representatives or successors in interest.”

Long v. Thompson, 34 Or. 359, 362 (55 Pac. 978), is authority for the proposition that the disability of a party, pending an appeal to the Supreme Court, does not abate the appeal, notwithstanding no application be made for a substitution within a year as required by this section, the statute not applying where death occurs after an appeal has been perfected. We do not understand that the learned counsel for defendant question the right of the stockholders to any property formerly belonging to the defunct corporation, but their contention in its final analysis is that in order to prosecute the action which was properly commenced and in which a judgment was rendered in the lower court during the existence of the corporation, a suit in equity is necessary to authorize the same. The fact

that parties may enforce their rights to property by a suit in equity does not show that they are not the owners thereof, but rather the reverse. The provisions of Section 38 intended to carry out fully the first declaration that no action shall abate by the disability of a party, and that those who succeed to the interest of the plaintiff are by virtue of this section entitled to prosecute the action. The claim the plaintiff once had against the defendant has not been annihilated. The stockholders of the corporation have an equitable, beneficial interest in the corporate property during the life of the corporation, and when it dies such interest ripens into a legal title and necessarily vests in the only persons having any interest in the corporate property who, in the absence of creditors, are the stockholders.

In *Baldwin v. Johnson*, 95 Tex. 85 (65 S. W. 171), the corporation, the John Henry Shoe Company, was dissolved and the stockholders attempted to appoint commissioners to wind up their affairs. The commissioners brought an action to recover certain real property, and the court held that they had no capacity to maintain the action. Thereupon the plaintiffs amended their complaint by averring that they were stockholders of the defunct corporation. The trial court instructed the jury that plaintiffs as stockholders had no such title or interest in the property as would permit them to recover, and directed a verdict for defendant. On appeal the court used this language:

“The judge of the District Court correctly instructed the jury that the plaintiffs could not recover as commissioners of the John Henry Shoe Company. * * But the property itself, upon the dissolution of the corporation, became the property of the stockholders, each one of whom owned an undivided interest in it in the proportion that his stock bore to the whole capital stock: *Harbor Co. v. Manning* [94 Tex. 558] (63 S. W.

627). In the case cited, Chief Justice GAINES, for the court, said: 'But in its last analysis the stockholders are the beneficial owners of the assets of the corporation. This proceeding is instituted upon the theory—which we think a correct one—that the shareholders are the ultimate owners of the corporate property, and when the corporation is dissolved, and its creditors are satisfied, they hold title to the assets in proportion to their respective shares.' The proposition quoted is well sustained by authority and by sound reasoning"—citing 2 Perry on Trusts, § 920; *How v. Waldron*, 98 Mass. 281.

See, also, *Pewabic Mining Co. v. Mason*, 145 U. S. 349 (36 L. Ed. 732, 12 Sup. Ct. Rep. 887); *Lauman v. Lebanon Valley R. R. Co.*, 30 Pa. 42 (72 Am. Dec. 685).

7-9. There being no creditors of the Service & Wright Lumber Company, the stockholders thereof hold the corporate property of the defunct corporation as tenants in common. They are its legal successors in interest. Section 27 of the Code directs that every cause shall be prosecuted in the name of the real party in interest except as otherwise provided in Section 29. It appears that the stockholders of the plaintiff corporation are the only parties interested as plaintiffs, and have a sufficient interest in the result of this action to prosecute the same. The motion to dismiss is overruled.

The defendant's contention that there is no authority for the substitution of the stockholders as parties plaintiff in accordance with the opinion heretofore rendered is not well taken. For the reasons set forth in the opinion of Mr. Justice BURNETT of September 30, 1913 (67 Or. 63 (135 Pac. 539), and the opinion of Mr. Justice McBRIDE, announced October 22, 1915 (152 Pac. 262), the first judgment in this action in the lower

court rendered November 3, 1911, will be reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

MR. JUSTICE EAKIN absent.

MR. JUSTICE BURNETT delivered the following dissenting opinion:

I dissent from the conclusion reached by Mr. Justice BEAN allowing substitution, in this action, of the stockholders of the defunct corporation plaintiff. The action ought to have been abated when the matter was first suggested after the expiration of five years from the dissolution of the plaintiff.

Argued June 13, reversed June 20, 1916.

PEERLESS PACIFIC CO. v. ROGERS.

(158 Pac. 271.)

Mechanics' Liens—Implied Consent of Owner.

1. Under Section 7416, L. O. L., providing that any person furnishing material shall be held to be the agent of the owner for the purposes of the act, that the goods were furnished at the instance of a clerk of the contractor, the contractor knowing nothing of the transaction, will not defeat the lien.

Mechanics' Liens—Reliance on Credit of Building—Election.

2. A materialman is not required to elect between his lien on the property and the contractor's personal liability, and reliance on one does not impair the other.

Mechanics' Liens—Reliance on Credit of Building—Presumption.

3. Where a complainant has complied with the provisions of the lien law and has done nothing to exclude the idea, it is presumed the credit of the building was relied on.

Mechanics' Liens—Furnishing Direct to Building.

4. It is not essential to a mechanics' lien that the material be furnished or delivered direct to the improvement, if, in fact, the

materials were delivered for use in the building and were used in its construction.

[As to mechanic's lien on realty for improvements made with consent but not at expense of owner, see note in *Ann. Cas.* 1916C, 1133.]

From Marion: WILLIAM GALLOWAY, Judge.

In Banc. Statement by MR. JUSTICE BEAN.

On October 7, 1915, the Peerless Pacific Company, plaintiff herein, filed a mechanic's lien in the office of the county clerk of Marion County, Oregon, in the sum of \$149.67, against W. H. Rogers, a contractor, and R. R. Ryan and Lizzie P. Ryan, the owners of property known as the "Ryan Markets" in the City of Salem. A suit was filed to foreclose this lien. The complaint is in the usual form.

The answer of the defendants R. R. Ryan and Lizzie P. Ryan consists of a general denial. The cause was tried, and the Circuit Court found in favor of defendants R. R. Ryan and Lizzie P. Ryan, and that the plaintiff was not entitled to a lien, as we understand the record, for the reason that the materials which were used by the contractor Rogers in the defendants' building were sold to him as a retail dealer upon his individual credit, and not to be used in the building. Plaintiff appeals. REVERSED.

For appellant there was a brief over the names of *Mr. Arthur H. Lewis* and *Mr. Howard Bennett*, with an oral argument by *Mr. Lewis*.

For respondent there was a brief over the name of *Messrs. McInturff & McInturff*, with an oral argument by *Mr. Herman F. McInturff*.

MR. JUSTICE BEAN delivered the opinion of the court.

1, 2. The question is principally one of fact. Mr. R. W. Nelson, the cashier and creditman for the plaintiff company, testified that Rogers purchased the material set forth in the lien to be used in the Ryan Markets, and that it was shipped with that understanding; that it was shipped between April 16, 1914, and June 27th of that year; and that the company would not extend credit to Mr. Rogers, the contractor, except in cases where he had contracts in order that he might complete them. His testimony is practically uncontradicted, save that the materials sent in April are claimed to have been shipped before Rogers and Ryan made the contract for the work. Mr. Rogers' clerk testified that he thought the contract was made about the 1st of May. It appears that he was not present when it was made, and Mr. Ryan, relying wholly upon memory, several months afterward endeavored to fix the date, which was not a material matter. The evidence by a great preponderance shows that the materials for which a lien is claimed by plaintiff were furnished to the contractor Rogers to be used, and were used, in the Ryans' building. All the material that was of such a nature that it could be was identified after the plumbing was installed. It appears that Rogers did have a shop where he kept a stock of plumbing supplies, but the evidence that plaintiff furnished the materials claimed is not refuted. Section 7416, L. O. L., provides that any person furnishing material to be used in the construction of any building shall have a lien upon the same for the material furnished at the instance of the owner of the building or his agent; and every contractor or person having charge of the construction, in whole or in part, of any build-

ing shall be held to be the agent of the owner for the purposes of this act. It is no doubt true that Mr. Rogers knew nothing about the plaintiff furnishing the material. This, however, would not change the matter. Mr. Rogers' clerk states that he took some of the materials used from the stock to the building, but he did not know when they were purchased by him. The fact that the materials purchased by Rogers from the plaintiff, as sworn to by the latter's agent, were placed in Rogers' shop would in no way defeat the lien. It is not important that the company charge the contractor personally with the debt. The claimant is entitled to both securities, the contractor's personal liability, and a lien on the property, and its reliance on the one did not impair its right to rely on the other. Plaintiff was not required to elect between the two as long as its debt or any part of it remained unpaid: *Bassett v. Bertorelli*, 92 Tenn. 548, 550 (22 S. W. 423).

3. When a claimant has complied with the provisions of the lien law and has done nothing to exclude the idea, it is presumed that the credit of the building was relied upon: *Green v. Thompson*, 172 Pa. 609 (33 Atl. 702); *Eufaula Water Co. v. Addyston Pipe & Steel Co.*, 89 Ala. 552 (8 South. 25).

4. It is not essential that the material be furnished or delivered direct to the improvement, if, in fact, the materials were delivered for use in the building and were used in its construction: *Hume v. Seattle Dock Co.*, 68 Or. 477 (137 Pac. 752, 50 L. R. A. (N. S.) 153). There is no pretense or suspicion in the case at bar that the materials for the plumbing in question were obtained elsewhere, or that those contracted for were not used in the building: See *Allen v. Elwert*, 29 Or.

428, 435 (44 Pac. 823, 48 Pac. 54); *Wills v. Zanello*, 59 Or. 291, 295, 296 (117 Pac. 291).

The decree of the lower court will therefore be reversed, and one entered here in favor of plaintiff as prayed for in its complaint, with \$50 as attorneys' fees.

REVERSED.

MR. JUSTICE BURNETT and MR. JUSTICE EAKIN not sitting.

Argued May 23, reversed June 20, 1916.

BRADSHAW v. PROVIDENT TRUST CO.

(158 Pac. 274.)

Mortgages—Foreclosure by Action—Pleading—Cross-complaint.

1. In a suit to foreclose a mortgage, a grantee of the mortgagor, if all the parties are before the court, may by cross-complaint seek reformation of his deed of the premises, by striking out a clause fraudulently inserted therein obligating him to pay the mortgage.

Mortgages—Transfer of Property—Assumption of Mortgage Debt—Fraud.

2. In such case, if the fraud is proved, or that the clause was inserted in the deed without the grantee's knowledge, he is not liable thereon to mortgagee.

Reformation of Instruments—Grounds—Negligence.

3. In such case, the failure of the grantee to read the deed before accepting it is not such negligence as will bar his relief.

Reformation of Instruments—Sufficiency of Evidence.

4. In a suit to foreclose against a grantee of the mortgagor pleading that he did not assume the mortgage and asking for reformation of his deed, the evidence showed that he did not agree to assume it, but that a clause purporting so to obligate him was inserted in one of eleven similar deeds without his knowledge.

Reformation of Instruments—Grounds—Mistake or Fraud.

5. Generally, where a memorandum in writing fails to conform to the contract between the parties in consequence of their mutual mistake, however induced, or the mistake of one party and fraud of the other, a court of equity will reform the instrument so as to make it conform to the actual stipulation of the parties.

[As to causes and proceedings for reformation of instruments, see note in 65 Am. St. Rep. 481.]

From Multnomah: GEORGE N. DAVIS, Judge.

Department 2. Statement by MR. JUSTICE BEAN.

Plaintiff James B. Bradshaw sues to foreclose a mortgage executed on December 22, 1913, in his favor by the Provident Trust Company to secure the payment of its note for the principal sum of \$10,000. The note was indorsed by the defendant G. F. Johnson, who was president and manager of the corporation at the time. The complaint is in the usual form, but in paragraph 9 thereof it is alleged, in substance, that on June 15, 1914, the mortgagor conveyed its interest in the mortgaged premises to the defendant Charles K. Henry; that for a valuable consideration he covenanted "with the said Provident Trust Company that the said note and mortgage of the plaintiff herein should be paid at maturity." Plaintiff prays for a personal judgment against the company, Henry and Johnson.

Henry and wife answered admitting the execution of the mortgage and that the property was conveyed to him by the Provident Trust Company subject to the mortgage, but denying that he made the alleged covenant to the company. He set forth a further and separate defense by way of a cross-complaint in effect as follows: That prior to his taking the deed from the Provident Trust Company he held its unsecured bonds in the sum of \$94,607.50, upon which it had defaulted in the payment of interest due thereon; that the company had acknowledged to him that it could not pay these bonds in money, and had induced him to accept in part payment thereof a conveyance to him of its equity in a large amount of suburban property in the City of Portland, Oregon, including that covered by

plaintiff's mortgage, subject, however, to certain mortgage liens thereon and street and sewer assessments; that Henry did not covenant nor agree with the company to assume or pay plaintiff's mortgage, but agreed only to take its equity therein at a stipulated value; that Miller Murdock, attorney for the company, submitted to him a blank form of deed to be used by it in making the conveyance, which form contained no covenant or agreement on the part of the grantee to assume and pay any prior lien; that the company agreed to make the several deeds in conformity with this blank, and, reposing confidence in Murdock and in Johnson, the company's president, he left the making of the deeds to them; that, intending to wrong him and without his knowledge or consent and contrary to their agreement, they purposely inserted in the deed a covenant binding the grantee to assume and pay a prior encumbrance upon the property conveyed, it being in part as follows, "and which encumbrances the grantor herein agrees to assume"; that, prior to the delivery of the deed in question, Johnson represented to Henry that all the deeds, eleven in number, were made according to the form previously submitted, and that, relying thereon, he did not examine them further than to check the descriptions of the property therein, with others assisting him; that he did not discover the wrongful insertion of the covenant until some time after the deeds had been recorded; that plaintiff demanded of him payment of the mortgage, whereupon he disclaimed liability thereon; that plaintiff is now claiming that the use of the word "grantor" in the covenant of said deed is a clerical error for grantee, and that he is bound personally to pay the debt of the Provident Trust Company. Henry prays for a refor-

mation of the deed as against the company and the plaintiff, by striking out said pretended covenant.

The Provident Trust Company replied to Henry's cross-complaint denying the material allegations thereof. Neither Johnson nor the plaintiff replied thereto, and the allegations thereof stand as admitted by them.

REVERSED.

For appellant there was a brief over the name of *Messrs. Manning, Slater & Leonard*, with an oral argument by *Mr. Woodson T. Slater*.

For respondent, James B. Bradshaw, there was a brief and an oral argument by *Mr. Chester G. Murphy*.

For respondents, Provident Trust Company and G. F. Johnson, there was a brief and an oral argument by *Mr. Miller Murdock*.

MR. JUSTICE BEAN delivered the opinion of the court.

1-3. The issues to be tried are: (1) Whether Charles K. Henry, when taking the title from the Provident Trust Company, agreed to assume and pay plaintiff's mortgage; and (2) whether the covenant was put into the deed by the Provident Trust Company in fraud of Henry's rights. The parties affected by the contract being in court, it was proper for defendant Henry to plead the facts as a basis for the reformation of the deed: *Albany City Savings Inst. v. Burdick*, 87 N. Y. 40. If the clause binding Henry, the grantee, to assume and pay the mortgage, was inserted in the deed fraudulently or without his knowledge so that he never gave his intelligent consent to the agreement, he is not liable thereon to the mortgagee: *Parker v. Jenks*, 36 N. J. Eq. 398; *Bull v. Titsworth*, 29 N. J. Eq. 73; *Albany City Savings Inst. v. Burdick*, 87 N. Y. 40.

Where one party to a contract is intrusted by the other to draw the written instrument to accord with the agreement, he will be held strictly to a faithful performance of the trust so reposed, and will not be held to say that the party defaulted should not have placed confidence in him: *Barlow v. Scott*, 24 N. Y. 40; *Botsford v. McLean*, 45 Barb. (N. Y.) 478; *Archer v. California Lbr. Co.*, 24 Or. 341, 345 (33 Pac. 526). The failure of Henry to read the deeds before accepting them is not such negligence as will deprive him of the relief for which he prays: 6 Pomeroy, Eq. Juris., § 680; 2 Pomeroy, Eq. Juris., § 856; *Archer v. Cal. Lbr. Co.*, 24 Or. 341, 345 (33 Pac. 526); *Howard v. Tettelbaum*, 61 Or. 145 (120 Pac. 373).

4. The record shows that the proposition for the liquidation of the bonds of the Provident Trust Company held by Henry was largely by letter. On June 4, 1914, Mr. Henry wrote the company that:

“After considering the certified accountant’s report and giving full consideration to the situation of your company and your proposal to accept properties in payment of the bonds, I hold of your company, I submit the following proposal to be accepted or rejected by 2:00 P. M. this 4th day of June. * * The properties enumerated and listed by you as under the Bradshaw mortgage of \$10,000, leaving an equity of \$33,336.”

By this letter Mr. Henry required payment of a cash balance of \$11,464. By letter of June 15th, the company informed Henry that they could not raise the money, but submitted for his consideration additional properties and \$5,000 for a return of a portion of the property. The arrangement having been made, Henry departed for California and authorized the Title & Trust Company of Portland to deliver to the Provident Trust Company, or Mr. G. F. Johnson, bonds of

the Provident Trust Company in the sum of \$72,300 upon delivery of the proper deeds of conveyance from that company to Henry. At the time of the transfer, however, on June 15, 1914, Henry returned and assisted in the examination of the eleven deeds. It appears that the Provident Trust Company had a printed form of deed. Henry asserts that he examined only one form of deed, of which the covenant was in substance as follows:

“And the said grantor does covenant to and with the said grantee, his heirs and assigns, that it is lawfully seised in fee of the above-granted premises; that they are free from all encumbrances, save and except taxes, street and sewer improvements and bonded indebtedness and a mortgage of \$2,100 in favor of I. G. Davidson and interest on said mortgage and conditions and restrictions above mentioned”—there being no covenant that the grantee assumed to pay the mortgage.

Henry claims that he did not examine the deed embracing the property covered by the Bradshaw mortgage, but was informed that the deeds were all alike, except that some were typewritten, as the descriptions of the property were too lengthy for the printed form.

A careful examination of the evidence does not show that there was any proposition made or agreed to that Henry should assume the mortgage in question. Mr. Johnson, the president of the Provident Trust Company, states that the matter was not discussed at the time. Afterward, when the question was called to his attention, he appeared to think that it made no difference whether the clause was inserted or not. He testifies that it was inserted intentionally. It was certainly for his interest that such a covenant be contained in the deed. In view of the fact that it was, as it were,

buried in the eleven deeds, and Henry relied upon the information which he had received from some of the officers of the Provident Trust Company that the deed was like another which he did examine, fair dealing required that his attention should be called to the clause when it had been inserted. As we understand the record, the trial court was of the opinion that Henry was precluded from obtaining relief on account of failing to read all the deeds. The eleven were presented to him and he did not examine the one in question. The matter is better explained by the common phrase that they "slipped one over on him."

The value of the equities in each class of the properties was admitted by the parties in the letters which passed between them on June 5, 1914, and the sum total thereof did not equal the amount of the debt by \$5,000, which amount was to be liquidated and paid by the owner. This, in addition to the express words of the respective letters, tends to show that Henry did not agree to assume and pay the plaintiff's mortgage as a part of the consideration of the conveyance of the title to these properties. There is some conflict in the evidence of Henry and of Johnson, president of the Provident Trust Company. John F. Daly, an officer of the Title & Trust Company, who had considerable to do with the adjustment of the matter and was familiar with the arrangement, understood that Henry was to take over all the equities in the properties according to the lists which he had. His evidence tends strongly to corroborate that of Henry. The latter had deeded a large amount of real estate to the Provident Trust Company for the bonds which he held. Some of this had been encumbered heavily by the Provident Trust Company, and it appears to have

been the very object of Henry to obtain what property he could for the bonds and obviate all the loss possible and not to assume indebtedness. He was accustomed to deal in realties of this kind, and apparently understood what is termed an equity in encumbered property. It appears that he desired to obtain the property or a chance thereon over and above the encumbrances, and did not become responsible for the mortgage.

5. It is the general rule that where a memorandum in writing fails to conform to the contract between the parties in consequence of their mutual mistake, however induced, or the mistake of one party and fraud of the other, a court of equity will reform the instrument so as to make it conform to the actual stipulation of the parties: *Albany City Sav. Inst. v. Burdick*, 87 N. Y. 40. In *Parker v. Jenks*, 36 N. J. Eq. 398, the syllabus reads as follows:

“Although a deed for lands contains the grantee’s personal assumption to pay a mortgage thereon, he cannot be held liable for a decree for deficiency after foreclosure of the mortgage, if it appears that such assumption was not part of his bargain for the purchase of the premises, and that he had no notice of its insertion in his deed.”

In *Andrews v. Gillispie*, 47 N. Y. 487, the attorney who drew the mortgage in question therein made it payable in five years instead of ten, as agreed between the parties. The court held that the mortgagor could have it reformed. In that case he could have discovered the mistake by simply reading the mortgage, and no artifice was used to prevent him from so doing. He executed it believing that the attorney had drawn it correctly, just as Henry in this case accepted the deed,

believing it had been drawn correctly, and the fault or negligence was just as great in the one case as in the other, and certainly, if such negligence does not bar relief on the ground of mutual mistake, there can be no foundation for saying that it should do so in the case of a clause inserted in an instrument by fraud. It is certainly not in consonance with equity and good conscience that one who by any means has perpetrated a fraud should be allowed to say to the defrauded party when he seeks relief in a court of conscience that he ought to have known better than to have believed and trusted him. The fraud alleged in the case at bar is clearly established. The decree of the lower court will be reversed, and one entered here striking from page 2 of the deed conveying the property embraced in the Bradshaw mortgage (Exhibit A) the words, "and which encumbrances the grantor herein agrees to assume," as prayed for in the answer of defendant Henry.

REVERSED.

MR. CHIEF JUSTICE MOORE, MR. JUSTICE HARRIS and MR. JUSTICE BENSON concur.

MR. JUSTICE EAKIN absent.

Argued June 20, affirmed June 27, 1916.

MEDSKER v. PORTLAND RY., L. & P. CO.

(158 Pac. 272.)

Death—Evidence—Sufficiency—Cause of Death.

1. Evidence that deceased stood on one grounded guy wire, reached for a charged wire, and fell and was killed, is insufficient to sustain a verdict that the fatal fall was due to touching the charged wire rather than through loss of balance.

[As to doctrine of *res ipsa loquitur* as applicable to injury to person from electrical appliances on private property, see note in *Ann. Cas.* 1913A, 1184.]

From Multnomah: CALVIN U. GANTENBEIN, Judge.

Department 2. Statement by MR. CHIEF JUSTICE MOORE.

This is an action by Florence A. Medsker, widow of Willis C. Medsker, to recover damages from the Portland Railway, Light & Power Company, a corporation, for causing the death of said Willis C. Medsker, which is alleged to have been caused by the defendant's negligence. From a judgment rendered on a directed verdict in favor of the defendant, the plaintiff appeals.

AFFIRMED.

For appellant there was a brief over the names of *Mr. C. M. White* and *Mr. George T. Wilson*, with an oral argument by *Mr. White*.

For respondent there was a brief over the names of *Mr. F. J. Lonergan* and *Messrs. Griffith, Leiter & Allen*, with an oral argument by *Mr. Lonergan*.

Opinion by MR. CHIEF JUSTICE MOORE.

1. It appears from a transcript of the testimony that on September 13, 1913, the deceased, a sober, experienced lineman, was employed by the Home Telephone Company, repairing its line at the intersection of Nineteenth and Multnomah Streets in Portland, Oregon. In ascending a tall pole of that company at the northwest corner of the street crossing mentioned, he placed his foot on a grounded guy wire leading to the west and was seen apparently trying to grasp a grounded guy wire above his head, leading south across Multnomah Street to the top of a guy pole around which it was wound and fastened. From the

top of this latter pole another guy wire descended to the south and was anchored in the ground. The stay wire which led to the south extended beneath and came in contact with a wire on the south side of Multnomah Street, which latter wire was operated by the defendant, the Portland Railway, Light & Power Company, and used in transmitting electricity for illumination. The Home Telephone Company had not installed a current-breaker, to prevent the flow of electricity along the south guy wire to the pole to the north, to which it was fastened.

The theory of the plaintiff's counsel is that the deceased, having placed his foot upon the ground wire extending west, thrust his hand up and brought it against the grounded south guy wire, which latter stay was charged with electricity by the defendant's wire, thereby forming with his body a circuit, in trying to escape from which he fell, striking his head and shoulders on the pavement, and died.

When the plaintiff had introduced her testimony and rested, the defendant's counsel moved for a judgment of nonsuit which was denied; the court then observing that the same question could be raised on a motion for a directed verdict, if no further evidence in support of the cause of action were produced. The defendant thereupon introduced in evidence a writing, which, omitting the names of the witnesses and the acknowledgment by the plaintiff certified to by a notary public, reads:

“These presents witness: That for and in consideration of the sum of fifteen hundred dollars (\$1,500.00) to me paid by the Home Telephone & Telegraph Company, of Portland, Oregon, and the further agreements on their part herein set forth, I do hereby covenant and agree that I will not sue the Home Telephone &

Telegraph Company, of Portland, Oregon, nor suffer suit to be brought on my behalf or on behalf of any of the heirs or representatives of my late husband, W. C. Medsker, on any cause of suit or action arising out of his death.

“I further agree that upon reimbursements of the necessary costs and charges therefor I will cause an administrator to be appointed over the estate of my said husband, and upon payment by the Home Telephone & Telegraph Company, of Portland, Oregon, to said administrator of the further sum of fifteen hundred dollars (\$1,500.00) I will cause the said administrator to give a like covenant not to sue the said Home Telephone & Telegraph Company, of Portland, Oregon.

“It is expressly agreed and understood, however, that this covenant is solely personal with the Home Telephone & Telegraph Company, of Portland, Oregon; that it does not discharge or release the right of action in said case; and that I may pursue any action that I may be advised against other defendants in said cause.

“In witness whereof, I have hereunto set my hand and seal, this 18th day of October, 1913.

“[Signed] MRS. FLORENCE MEDSKER. [Seal.]”

The defendant also offered in evidence a similar paper, executed to the same company by the plaintiff, as administratrix of the decedent's estate, and acknowledging the further payment of \$1,500.

The court, holding these memoranda to be releases of a joint tort-feasor, sustained a motion for a directed verdict for the defendant, and, a judgment having been rendered thereon, it is contended by plaintiff's counsel that an error was thereby committed. It is maintained by defendant's counsel, however, that the testimony offered by the plaintiff failed to establish a cause of action sufficient to be submitted to the jury, and, such being the case, any action of the court, based upon the receipts referred to, was immaterial.

If it be determined that the judgment of nonsuit should have been given, it will be unnecessary to consider whether or not the receipts executed to the Home Telephone & Telegraph Company by the plaintiff were releases or covenants not to sue that joint tort-feasor. For a discussion of this subject, see 1 Cooley, Torts (3d ed.), 235; *Stires v. Sherwood*, 75 Or. 108 (145 Pac. 645); *McBride v. Scott*, 132 Mich. 176 (93 N. W. 243, 102 Am. St. Rep. 416, 1 Ann. Cas. 61, 61 L. R. A. 445); *Pickwick v. McCauliff*, 193 Mass. 70 (78 N. E. 730, 8 Ann. Cas. 1041); *Ducey v. Patterson*, 37 Colo. 216 (86 Pac. 109, 119 Am. St. Rep. 284, 11 Ann. Cas. 393, 9 L. R. A. (N. S.) 1066); *Robinson v. St. Johnsbury etc. R. Co.*, 80 Vt. 129 (66 Atl. 814, 12 Ann. Cas. 1060, 9 L. R. A. (N. S.) 1249); *Musolf v. Duluth Edison Electric Co.*, 108 Minn. 369 (122 N. W. 499, 24 L. R. A. (N. S.) 451); *Farmers' Savings Bank v. Aldrich*, 153 Iowa, 144 (133 N. W. 383); *Louisville & N. R. Co. v. Allen*, 67 Fla. 257 (65 South. 8, L. R. A. 1915C, 20); *Abb v. Northern Pacific Ry. Co.*, 28 Wash. 428 (68 Pac. 954, 92 Am. St. Rep. 864, 58 L. R. A. 293).

Considering the motion for a judgment of nonsuit: The testimony of George L. Hines, the city foreman of the Home Telephone Company, is to the effect that he reached the scene of the accident about 20 minutes after it occurred; that he found the south guy wire, which extended to the ground, "hot," indicating it was charged with electricity; that a man climbing the telephone pole, at the place of the accident, and standing on the west guy wire, would necessarily get a shock if he touched the south guy wire. In referring to the latter stay which was wrapped around the top of the guy pole, and to another stay which encircled it at the

same place and in the same manner and was anchored in the ground, the witness stated upon oath:

“They are the same wire by contact. It isn’t a continuous wire, but metallically they are the same.”

Harry Ahtert, who was standing at the northeast corner of the intersection of Nineteenth and Multnomah Streets, facing west and talking with Harold Cherry, who was facing east, referring to Mr. Medsker, testified as follows:

“Well, he started in and climbed the pole with his back toward me, and I was watching him. I wasn’t paying much attention to him, though; but when he got up there he swung around on the cable, and I wasn’t just watching him right then, but just when I looked up I saw him grab for that long cable [referring to a telephone cable suspended by metallic hooks to a messenger wire, upon which he was working and which was immediately above the south guy wire].

“Q. And what happened?

“A. And he fell. * *

“Q. And where were his feet? Do you know?

“A. On this one [alluding to the west guy wire, indicated as No. 5 on a photograph received in evidence].

“Q. Just state what his position was up there.

“A. He was facing north. * *

“Q. How long was he there?

“A. Oh, he was climbing up, and when he got up there he just stopped for an instant—just a moment.

“Q. And then what?

“A. And then he started in to fall, and grabbed for the cable.”

On cross-examination he was asked:

“And you were watching Mr. Medsker climb that pole, were you?”

He answered: “Yes, sir.

“Q. Watching him every moment?

“A. No, I wasn't watching him all the time. I was just glancing up there and—

“Q. (Interrupting.) Just glancing from time to time?

“A. Yes, sir.

“Q. And when you saw him climb up near the top of the pole, you saw him make a grab for the cable, didn't you?

“A. Yes, sir.

“Q. And he did not touch it, did he?

“A. No, sir.

“Q. And he missed it and fell over backward?

“A. Yes, sir.”

On redirect examination this witness, referring to Mr. Medsker at the time he fell, further testified: “He grabbed with his right hand, but I couldn't see his left hand, because he was on that side.” The court, referring to the deceased, inquired: “Did he reach the cable with his right hand?” The witness replied: “No, he didn't reach it with his right hand.”

This constitutes the entire testimony relating to the cause of the injury. The death was undoubtedly occasioned by the fall, but whether the descent resulted from coming in contact with the south guy wire, or was caused by the deceased losing his balance, is problematical. In *Spain v. Oregon-Washington R. & N. Co.*, 78 Or. 355 (153 Pac. 470, 475), Mr. Justice McBRIDE, in discussing the uncertainty of such testimony, observes:

“When the evidence leaves the case in such a situation that the jury will be required to speculate and guess which of several possible causes occasioned the injury, that part of the case should be withdrawn from their consideration.”

We conclude the rule thus announced is controlling in this instance, and, this being so, the judgment should be affirmed, and it is so ordered. AFFIRMED.

MR. JUSTICE BEAN, MR. JUSTICE HARRIS and MR. JUSTICE MCBRIDE concur.

Argued June 20, affirmed June 27, 1916.

CLARKE v. WARD & OBENCHAIN.

(158 Pac. 277.)

Appeal and Error—Review—Verdict.

1. In an action for the conversion of a carload of lumber which the plaintiff alleged to be his property under sale from a party against whom the defendant corporation had brought action and attachment, evidence *held* to support a verdict for the defendant, within the rule that where there is any evidence to support the verdict the court, under Article VII, Section 3, of the Constitution, is precluded from disturbing it.

From Klamath: GEORGE NOLAND, Judge.

Department 2. Statement by MR. JUSTICE BEAN.

This is an action by W. I. Clarke, against Ward & Obenchain, a corporation, for the conversion of a carload of lumber which the plaintiff alleges to be his property.

The answer is a general denial. The cause was tried by the court and a jury, and a verdict rendered in favor of defendant. AFFIRMED.

For appellant there was a brief over the names of *Mr. W. M. Duncan* and *Messrs. May & Merryman*, with an oral argument by *Mr. Duncan*.

For respondent there was a brief and an oral argument by *Mr. Rollo C. Groesbeck*.

MR. JUSTICE BEAN delivered the opinion of the court.

1. There were no objections or exceptions taken to the procedure upon the trial of this cause. It is contended on the part of plaintiff that there is no evidence to support the verdict. It appears that the lumber in question was attached in an action brought by the defendant corporation as the property of W. B. Barnes, whom plaintiff called to substantiate the allegations of his complaint. Barnes testified that he had sold the lumber to the plaintiff and received \$1,500 therefor, but upon cross-examination his evidence tended to show that Barnes purchased a sawmill and outfit from plaintiff, that there was an unsettled matter between them, and that the sale of the lumber was not complete. He stated that he would have had some money coming from Clarke over and above what he owed him, and had this lumber been allowed to proceed on its way, as shipped, he would have received the money and would have brought it back and paid defendant. The jury were warranted in finding from the evidence that there had been no sale of the lumber by the Barnes Lumber Company to the plaintiff, and that the claim of such sale was a mere pretense. Indeed, it is difficult to see how the jury could have determined otherwise. Where there is any evidence to support the verdict, under Section 3 of Article VII of the Constitution (L. O. L., p. xxiv), the court is precluded from disturbing the same.

The judgment of the lower court is therefore affirmed.

AFFIRMED.

MR. CHIEF JUSTICE MOORE, MR. JUSTICE MCBRIDE and MR. JUSTICE HARRIS concur.

Argued June 16, reversed June 27, 1916.

WEIGAR v. STEEN.

(158 Pac. 280.)

Appeal and Error—Review—Findings of Fact.

1. Upon an appeal from a cause tried to the court without a jury, the evidence will be reviewed only to ascertain if it is competent to support the findings, which will be sustained unless the evidence is insufficient as a matter of law, to support them.

Evidence—Presumptions—Statute.

2. Under Section 799, subdivision 33, L. O. L., providing that a thing once proved to exist continues as long as is usual with things of that nature, evidence that defendant was in possession of a sum of money two years prior to the supplemental proceedings, which does not show how long it is usual for such persons or anyone to retain a sum of money, is not aided by the disputable presumption declared by the statute, nor is it sufficient to show that defendant had the money until the time of the proceeding.

[As to presumption of continuance, see note in 50 Am. Rep. 297.]

From Coos: JOHN S. COKE, Judge.

In Banc. Statement by MR. JUSTICE BEAN.

This is an action by H. B. Weigar against Dan Steen. The appeal is by defendant from an order in proceedings supplemental to execution, requiring him to pay a balance of \$800.44 on a judgment rendered September 20, 1915. On January 12, 1914, plaintiff filed in the Circuit Court his affidavit for an order for the examination of the defendant in supplemental proceedings under the provisions of Section 253, L. O. L. The order was served on the latter January 13, 1914, but no hearing was had, and on November 10, 1914, a new affidavit for the examination of the defendant was filed. Hearing was had, and on February 3, 1915, he was ordered to pay the judgment.

REVERSED.

For appellant there was a brief over the names of *Mr. Oliver P. Coshow* and *Mr. J. J. Stanley*, with an oral argument by *Mr. Coshow*.

For respondent there was a brief over the names of *Mr. Walter Sinclair* and *Mr. A. H. Blachley*, with an oral argument by *Mr. Sinclair*.

MR. JUSTICE BEAN delivered the opinion of the court.

The evidence consists largely of that of defendant Steen and the plaintiff, supplemented by the deposition of the cashier of the Douglas National Bank of Roseburg, regarding the defendant's bank account. It tends to show that the defendant, Dan Steen, sold a quarter-section of land in November, 1912, for \$6,000, and deposited \$5,300 in the bank, making, together with the deposits he then had, \$5,970.60. Various sums were withdrawn from the bank at different dates and on March 20, 1913, defendant drew out \$5,570.60. On August 26th of that year the balance remaining was \$991.85, and on December 6th, \$81.85, which amount was attached by plaintiff in the original action. At the time of the hearing the defendant swore that he had no money or credit with which to satisfy the balance of the judgment; that the money had been spent in various ways. The Code provides that:

At such a hearing "either party may examine witnesses in his behalf, and if by such examination it appear that the judgment debtor has any property liable to execution, the court or judge before whom the proceeding takes place * * shall make an order requiring the judgment debtor to apply the same in satisfaction of the judgment": Section 254, L. O. L.

1. Exception is taken by defendant to the introduction of immaterial evidence. Upon an appeal from a cause tried to the court without a jury, the evidence will be reviewed only to ascertain if it is competent to support the findings: *Eugene v. Lowell*, 72 Or. 237 (143 Pac. 903). Findings of fact have the same force as the verdict of a jury, and will be sustained unless the evidence is insufficient as a matter of law to support them: *Norman v. Ellis*, 74 Or. 168 (143 Pac. 1112); *Smith v. Hurley*, 73 Or. 268 (143 Pac. 1123).

2. It is contended by counsel for defendant that the evidence is insufficient to support the findings. The possession of \$5,970.60 by defendant on November 29, 1912, which amount had been reduced to \$991.85, August 26, 1913, about two years prior to the supplemental proceedings in this case, is not sufficient to show that the defendant had a certain sum of money on November 28, 1914, the date of the service of the order herein, or thereafter, at the time of the hearing of the cause, February 3, 1915. The disputable presumption declared by subdivision 33 of Section 799, L. O. L., that "a thing once proved to exist continues as long as is usual with things of that nature," does not aid the evidence or show that defendant retained the money during the lapse of time mentioned. The testimony does not show how long it is usual for persons like the defendant or anyone to retain a certain sum of money. This principle is thoroughly discussed and plainly enunciated in *Hammer v. Downing*, 41 Or. 234 (66 Pac. 916), and in *State ex rel. v. Gutridge*, 46 Or. 215 (80 Pac. 98), and needs no further elucidation. There was no competent evidence introduced upon the hearing of this cause to show that Dan Steen, the

debtor, had any money or property liable to execution at the time of the hearing or when the order was made.

The judgment of the lower court will be reversed.

REVERSED.

MR. JUSTICE HARRIS not sitting.

MR. JUSTICE EAKIN absent.

Argued June 13, affirmed June 27, 1916.

NORTHWESTERN TRANSFER CO. v. INVESTMENT CO.

(158 Pac. 281.)

Contracts—Construction—Intent.

1. Under Section 716, L. O. L., in the construction of written agreements, the intention of the parties is to be pursued, if it can possibly be done.

Partnership—Creation.

2. An agreement between several parties to build a house, containing no stipulation to share in the losses and profits of the business, establishing no community of interest between the parties in the subject matter of the contract, and manifesting no intention of the parties to become partners, did not create a partnership.

Partnership—Character of Member.

3. Each member of a partnership is a principal with a joint interest in the partnership property, and an agent of the other partners in dealing with third persons concerning partnership transactions.

Partnership—Notice.

4. Notice to one partner, in reference to any matter relating to a transaction within the scope of the firm's business, is notice to all.

Joint Adventures—Advances—Rights of Party to Sell.

5. Where an investment company agreed to sell lots at a certain price, and agreed to and loaned money to the other parties to an agreement for a joint venture in building a house for sale, and such other parties failed to purchase the lots or make any sale of the house and lots, the investment company was entitled to sell, substantially as in foreclosure, to obtain its advances.

[As to mutual rights and liabilities of parties to joint adventure, see note in *Ann. Cas.* 1912C, 202.]

From Multnomah: WILLIAM N. GATENS, Judge.

In Banc. Statement by MR. JUSTICE BEAN.

This is a suit by the Northwestern Transfer Company, a corporation, against the Investment Company, a corporation, for an accounting. From a decree in favor of defendant Investment Company, plaintiff appeals.

The transaction was about as follows: On November 1, 1908, the defendant Investment Company entered into a contract with the plaintiff and its codefendants, who are the same parties signing schedule A referred to in the complaint. The material parts of this agreement are as follows:

“This agreement made * * between the parties signing Schedule A hereto attached, * * herein described, parties of the first part, and the Investment Company, * * party of the second part.

“Witnesseth: Party of the second part agrees to sell to parties of the first part, * * lots Nos. 7 and 8, Block No. 23, Piedmont, in the City of Portland, for the price or sum of two thousand three hundred dollars (\$2,300) at any time within one year of the date hereof.

“Parties of the first part agree at once to begin the erection of a dwelling upon said lots from the plans and specifications, signed by the respective parties, * * under the direction and superintendence of A. H. Faber, architect. * * Investment Company agrees to furnish toward the erection and completion of said dwelling a sum not exceeding two thousand five hundred dollars (\$2,500) for the labor and materials as set forth in Schedule B hereto attached. * * Said dwelling shall be sold by the said parties of the first part as speedily as possible and the proceeds thereof paid to the said Investment Company, who shall execute a good and sufficient title to the purchaser

thereof. The proceeds of such sale shall be divided and distributed to those entitled thereto as follows:

“(1) The price of said lot shall be paid in full to said Investment Company.

“(2) The amount of all advances shall be refunded to said company in full, together with interest thereon at the rate of 7 per cent per annum from the date of such advancements.

“(3) All taxes and insurance premiums paid by the said company subsequent to the commencement of said dwelling shall be treated as advancements and to be so paid.

“(4) All outstanding bills for labor and materials other than those done or supplied by the parties of the first part shall be paid in full.

“(5) The respective amounts set forth in Schedule A shall be paid to said parties of the first part as compensation for the work or materials supplied by them.

“(6) Any profit derived upon the sale of said house shall be divided among the said parties of the first part in the ratio that their respective contributions of work or materials bears to the whole amount so contributed, so shall their respective dividends bear to the total profit realized.

“(7) Should any loss be incurred on such venture said Faber agrees that said loss shall be paid out of any sum or sums otherwise payable to him as set forth in Schedule A. Should such loss exceed said sums the same shall be ratably deducted from the other sums set forth in such schedule.

“It is further agreed that should the house not be sold and disposed of within one year from date the said Investment Company may expose the same to public sale by open vendue or outcry and sell the same to the highest and best bidder and may at such sale become the purchaser thereof, any law prohibiting trustees purchasing at their own sale to the contrary notwithstanding.”

By schedule A the Northwestern Transfer Company agreed to haul the stone for the construction of the

building at the rate of \$3.50 a ton and to advance the freight which amounted to \$1,249, with which it complied. Pursuant to the terms of the agreement defendant advanced the sum of \$2,500 to the first parties, who commenced the erection and construction of the dwelling-house upon the lots as therein provided, under the directions of A. H. Faber, architect. After that amount was exhausted the first parties applied to the defendant company for financial assistance, and at their special instance and request it advanced other sums of money under the agreement and extended and continued the time in which the dwelling should be completed for a greater period than specified in the contract. The total advancements made by the defendant to the first parties, together with the price of the lots with interest thereon, aggregated \$13,136.40. The first parties did not sell the house as contemplated by the contract, but allowed the same to remain unoccupied and to deteriorate in value, and for more than four years made no attempt to provide means with which to repay defendant for its advances. Pursuant to the terms of the contract the Investment Company, after advertising the house and lots for sale and after due notice to the several parties of the first part, on June 21, 1913, exposed the property for sale publicly to the highest bidder and purchased it for \$12,300, which was insufficient, it is alleged, to pay it the purchase price of the lots and the advancements in money.

AFFIRMED.

For appellant there was a brief over the names of *Mr. F. B. Woodruff* and *Messrs. Emmons & Emmons*, with an oral argument by *Mr. Woodruff*.

For respondent there was a brief over the names of *Messrs. Bronaugh & Bronaugh* and *Mr. Franklin F. Korell*, with an oral argument by *Mr. Earl C. Bronaugh*.

MR. JUSTICE BEAN delivered the opinion of the court.

1-3. It is the contention of plaintiff that in accordance with the terms of the contract a partnership was created between the parties of the first part and the Investment Company, and that the latter, after purchasing the property, held it in trust for the other parties: Section 715, L. O. L.; *Egan v. Oakland Ins. Co.*, 29 Or. 403, 411 (42 Pac. 990, 54 Am. St. Rep. 798). In the construction of written agreements the intention of the parties is to be pursued if that can possibly be done: Section 716, L. O. L.; *Weidert v. State Ins. Co.*, 19 Or. 261, 270 (24 Pac. 242, 20 Am. St. Rep. 809). The agreement entered into between the parties in this case does not establish a partnership between the plaintiff and the defendant Investment Company, for the following reasons: (1) There is no stipulation to share in the profits and losses of the business: *Hanthorn v. Quinn*, 42 Or. 1, 7 (69 Pac. 817). (2) There is no community of interest between the parties in the subject matter of the contract: *Shebley v. Quatman*, 66 Or. 446 (134 Pac. 68). And (3) there is no intention manifested by the parties to become partners: *North Pac. Lbr. Co. v. Spore*, 44 Or. 462, 470 (75 Pac. 890). There was, however, a partnership created between the other parties signing schedule A, including the plaintiff. Accordingly, each member thereof is a principal having a joint interest in the partnership property and an agent of his assistants in dealing with

third persons concerning partnership transactions: *Hanthorn v. Quinn*, 42 Or. 1, 7 (67 Pac. 817).

4. The plaintiff complains that it was not consulted nor advised as to advances made by the defendant to the first parties. However, it cannot avoid the acts of its copartners in dealing with the Investment Company in this case by asserting that it had no knowledge of them, for the reason that notice to one partner in reference to any matter relating to a transaction within the scope of the firm's business is notice to all of them: 30 Cyc. 530.

5. According to the terms of the contract and the evidence in the case, the Investment Company agreed to sell the lots mentioned at a certain price, and agreed to and did loan money to the other parties to the agreement who entered into a joint venture in building a house for sale. It may not have been a wise contract for the plaintiff to make; but that is a matter solely for it as the court cannot stipulate for it. The parties of the first part, as they are generally termed, having failed to purchase the lots or make any sale of the house and lots, the only thing remaining for the defendant to do was to sell the same substantially as in a foreclosure in order to obtain its just dues.

It is complained that the Investment Company charged interest on the price of the lots to which it was not entitled, but it is not necessary to discuss this matter, as without such interest there would still be left an amount greater than that bid for the lots. In order to do equity, the parties interested should pay the amount due to the Investment Company or redeem the property. There is little controversy in regard to the facts in this case. The construction of the con-

tract of the parties determines the issue. The decree of the lower court was correct, and is affirmed.

AFFIRMED.

MR. JUSTICE BURNETT not sitting.

MR. JUSTICE EAKIN absent.

Argued June 15, affirmed June 27, 1916.

PORTLAND-OREGON CITY RY. CO. v. PENNEY.*

(158 Pac. 404.)

Eminent Domain—Exercise of Right—Power of State.

1. The state has plenary right to prescribe the conditions upon which it will confer upon corporations the privilege of exercising the right of eminent domain.

Eminent Domain—Damages—Increased Value—Statutes.

2. Under Section 6839, L. O. L., providing that no appropriation of private property shall be made until compensation therefor is made to the owner, irrespective of any increased value by reason of the proposed improvements, an owner cannot have any increased value which accrued to his land from a proposed improvement added to his damages, and the party condemning the land cannot have such increased value treated as a part of the compensation and deducted from the amount which would compensate if the land were purchased for any other purpose.

[As to evidence of the special value of property taken in the exercise of eminent domain, see note in 124 Am. St. Rep. 536.]

Eminent Domain—Railroad Right of Way—Measure of Damages.

3. The measure of damages for the taking of land for a railroad right of way was the actual cash market value of the strip taken and the incidental depreciation in the market value of the part not included in the right of way.

Eminent Domain—Damages—Evidence—Technical Error.

4. In a proceeding to condemn a strip of land for railroad right of way, the admission of the owner's testimony that before the rail-

*For authorities on the question of special value of property for the purposes for which it was taken, as an element of damages in condemnation proceedings, see notes in 11 L. R. A. (N. S.) 996 and 46 L. R. A. (N. S.) 392.

road went through a certain party offered him \$2,300, and that he had agreed to sell it for \$2,500 cash, was technical error.

Eminent Domain—Review—Discretion of Court—Damages—Evidence.

5. In proceeding to condemn a strip of land for railroad purposes, where it appeared that at about the time of the taking there was little or no active market for land in the vicinity, and that there were few sales by which to fix a standard market value, the admission of testimony of persons residing and owning land in the vicinity that lands situate near that taken were valued at from \$600 to \$800 an acre, and that it was suitable for gardening purposes, in view of the liberal rules as to the admission of evidence tending to show value, was not an abuse of such discretion.

Eminent Domain—Review—Harmless Error—Admission of Evidence.

6. In a condemnation proceeding, technical error in permitting the owner to state what was offered him for his land and what he demanded was not reversible error, where such statement was merely his way of putting a value upon his land, and where the effect of his whole testimony was merely that he considered it worth a certain amount cash.

From Clackamas: JAMES U. CAMPBELL, Judge.

In Banc. Statement by MR. JUSTICE McBRIDE.

This is an appeal from a judgment for damages given in a condemnation proceeding brought by the Portland-Oregon City Railway Company, a corporation, against J. R. Penney and P. E. Penney in Clackamas County.

The plaintiff seeks to condemn for the purposes of a passenger and commercial railway a strip of land 40 feet in width running diagonally through defendants' premises, which consist of a lot in Willamette Park containing about five acres. The defendants answered alleging that their damage by reason of the proposed taking would be \$2,000. In the reply plaintiff set up the following counterclaims against the incidental damages: (1) That the tract of defendants is valuable chiefly for gardening purposes, and, being distant from the main thoroughfares of travel and difficult of access, has never been cultivated at a profit, and that by reason of the construction of the proposed road it would be made accessible to market, its rental enhanced, and

its market value increased in the sum of \$500; (2) that plaintiff intends to construct a depot on the northerly boundary of the tract in question for the convenience of passengers and for taking and delivering freight, and that thereby defendants' land will be increased in value the sum of \$500; (3) that the said lands are situated in a ravine and distant from the main highway, and the only ingress and egress thereto at the present time is over a 40-foot unimproved highway; that in reaching said tract of ground from the main highway it is necessary to go down a hill, and in leaving with a load for market it is necessary to pull the load up quite a hill before reaching the main highway; that on account of the construction of said railway through said land another and more convenient highway will pass through said premises, and will be of great benefit and convenience to defendants, and will enable them to ship their freight to market from their own lands without the expense and loss of the heavy pull from said premises to the main thoroughfare, and will enhance the value of said lands in the sum of \$500, and that the counterclaims in the amounts stated are presented as a setoff against any or all damages which defendants claim by reason of the construction of said railway; (4) that the land of defendants is composed of two distinct qualities or kinds of soil, the railroad grade heretofore constructed on and across said premises dividing exactly the two different kinds of soil on said tract of land, the land easterly from said grade being a sand and clay loam, suitable for clover, fruit and such products, while the land on the westerly side of said grade is a wet swale soil, valuable and only fit and suitable for cultivation after proper ditches have been dug through the same and led off to lower ground, and that in the construction

of said grade the plaintiff dug ditches on either side of said grade in such a manner as when connected with a main ditch now passing through said low land farther west will aid materially in draining the low land of defendants and add to its fertility and value, and this plaintiff is now willing and proffers to connect the ditches already dug on either side of said right of way with defendants' main ditch situated west of the tract in such manner as may be prescribed by the court, and will remove any surplus waters collecting along either side of said roadway, and will keep said ditches and any connecting ditches so constructed in repair during the life of the railroad. The court excluded evidence tending to sustain each of these counterclaims, and withdrew them from the consideration of the jury, to which ruling plaintiff excepted. There were objections by plaintiff to the admission and rejection of testimony which will be noticed in the opinion.

AFFIRMED.

For appellant there was a brief over the names of *Mr. Harvey E. Cross* and *Mr. Thomas A. Burke*, with an oral argument by *Mr. Cross*.

For respondents there was a brief over the names of *Mr. Leroy Lomax* and *Mr. B. W. Taylor*, with an oral argument by *Mr. Lomax*.

MR. JUSTICE McBRIDE delivered the opinion of the court.

1, 2. Section 6839, L. O. L., provides, among other matters:

“No appropriation of private property shall be made until compensation be made therefor to the owner thereof, irrespective of any increased value thereof, by reason of the proposed improvement.”

With the justice or injustice of this rule we have nothing to do, as the state has plenary power to prescribe the conditions upon which it will confer upon corporations the privilege of exercising the right of eminent domain. The language above quoted is plain, and clearly means that in computing the damages to a tract of land by reason of the construction of the road across it the owner cannot be heard to say that any increased value which may accrue to the land by reason of the facilities offered by the proposed improvement shall be added to his damages, nor can the corporation be heard to say that such increased value shall be treated as a part of his compensation and subtracted from the sum which would be compensation if the land were purchased for any other purpose than a railroad.

3. The measure of damages is the actual cash market value of the strip taken and the depreciation in market value of that portion of the tract not actually included in the right of way, which damages are sometimes termed incidental damages; and it is in respect to the measurement of these that courts have experienced the greatest difficulty. To the ordinary mind, unhampered by precedent and unrestrained by statute, it would appear that, if the owner were paid the full market value of the strip taken, the value of his property being greatly increased by the improvement and by the facilities afforded for marketing the produce grown upon the ground not included in the strip, he would not be entitled to a single cent by way of damages because his land had been cut into two parcels instead of being left intact. This would appear to be the common-sense view of the matter, even if the lands of his neighbors should be equally enhanced in value; but the statute in this state and statutes and judicial

decisions in other states have said that increase in the value of the property by reason of the construction of the road shall not be considered in estimating damages, and, in effect, require the jury to estimate all the inconveniences caused by the construction of the road and to eliminate the incidental benefits which are shared in common by the other members of the community. This seems to be the law in Oregon, and, while the writer follows it with unwilling feet, the courts are bound to recognize it until it is amended. In this view the court was entirely justified in withdrawing the first three counterclaims from the jury. As intimated in *Portland & O. C. Ry. Co. v. Ladd Estate*, 79 Or. 517 (155 Pac. 1192), the benefits pleaded are shared in a greater or less degree by all of the community along the line of the proposed road; the difference being merely one of degree rather than of class. The last offset was not fully pleaded, in that it merely stated that defendants would be "greatly benefited" without stating any amount or sum in which defendant would be so benefited.

4. Exception was taken to the ruling of the court respecting certain testimony introduced by defendants for the purpose of showing the market value of the tract. The bill of exceptions is very meager, and appears to have been made up and signed without service upon the defendants' attorneys and without any notice to them. In many respects it fails to show the relation of the testimony to which objection was made to that which preceded or followed it, and is far from being sufficient to bring before us the exact situation as it existed at the trial. J. R. Penney, being a witness in his own behalf, was asked the following question:

"Mr. Penney, I will ask you if you had any *bona fide* offers to purchase it [referring to the land in question] last year?"

The witness, over the objection of plaintiff, answered:

"Before the railroad went through there Mr. Greene offered me \$2,300. That was before the railroad ever came there. I said he could have it for \$2,500, and it would have to be a cash proposition at that."

The admission of this testimony was a technical error: Lewis on Eminent Domain (2 ed.), § 446, and cases there cited; 13 Ency. Ev. 451, and cases there cited.

Mr. Samuel Penney, being called as a witness for defendants, gave the following testimony:

"Q. Are you acquainted with the value of the land?

"A. I know what I paid for what I have got.

"Q. Do you know what the Webber tract sold for just south?

"Mr. Cross: The Webster tract?

"A. Yes, sir.

"Mr. Cross: That does not make a competent, qualified witness as to the value.

"Court: Whether he knows the value of the land taken from sales taken place in recent times.

"Q. Do you know the market value of the lands sold in that vicinity from sales that have been made in recent years?

"A. I have paid no attention; I have heard of sales made, but I do not know of any positive sales that have been made.

"Q. You have heard of sales about there? Well, you know from just what you have heard? You were not present, you mean, when the money passed?

"A. I could not say about any tract the sale was made on, what price was paid on it. I could not come out here and say, because I don't know.

"Q. Do you know what the people asked for their land?

"A. I know what I asked for mine.

"Q. Do you know what Mr. Greene asked for his?

"A. I have heard him say.

"Q. He has two five-acre tracts?

"A. Yes, sir; one on the north, and one on the west.

"Q. Do you know what people generally hold their land for?

"A. I have heard them say.

"Mr. Cross: I object to that as being incompetent.

"Q. You know what you ask for it and what you paid for it, and from what you heard after the sales of other land, and what you know of the sales that were made in the last year or two. From all that information what would you say was a reasonable market value of your brother's property?

"Mr. Cross: I object to that. He has not shown himself qualified and the testimony is incompetent.

"Court: I think it is competent to go to the jury for what it is worth. I think the court has held a man who owns land himself in the immediate vicinity can fix what he takes the value of his land. The objection will be overruled, and the exception allowed.

"A. Well, the land on the road adjoining my brother's place there that him and I owned at one time, that I bought for him I consider that is worth somewhere near \$600 or \$700 an acre."

He was allowed to say in the same connection that his brother's land, which is the land in controversy, was a better piece of ground than his. This excerpt standing by itself is too inadequate for the court to be able to say whether there was substantial error in permitting it to go to the jury. From it we gather that the witness is an adjoining proprietor; that he knows for what another tract of land just south of the land in controversy sold; that he had heard of sales of land being made in the vicinity, but could not say of his own knowledge what price was paid; that he knew by general hearsay at what the neighbors held their land; that he bought his brother's land for him; that his own land adjoining was worth \$600 an acre; and that he considered his brother's land a better piece. Mr.

Greene, who owned a tract adjoining the land in controversy, was permitted to testify as to the value of his own land and of other lands in the immediate vicinity, and to state what the asking price of such land was. He testified that he would not take less than \$1,000 an acre for his tract, and described his buildings and improvements. It does not appear that there was any objection made to this part of his testimony. Thereafter the following questions were asked:

“Q. What is the character of your five acres on this side of Mr. Penney’s five acres adjoining on the west? Is it improved or unimproved?

“A. Most of it is improved ground.

“Q. Is it all cleared?

“A. There is about an acre that is not cleared. I have a peach orchard on it, and I have commenced grubbing the peaches there last year.

“Q. What is the value of the tract on the west side of his [meaning Mr. Penney’s]?

“Mr. Cross: I object to that, and ask to have the answer stricken out on the ground that he has not shown himself to be competent. It seems to me the rule does not permit a man to show the value of his tract of ground, but it has already been answered.

“Court: I still think the only way where there are no sales that are known of for the men to fix what they know is the value of their own property.

“Mr. Cross: I note an exception to the ruling of the court.

“Q. What is the reasonable market value of this tract on the west side of Mr. Penney’s land? How much is that worth?

“A. I know what I would ask for it.

“Q. Well, knowing the character of the land and all those things and from all the information you have—

“Mr. Cross: I object because he has not shown himself qualified as a witness.

“Court: It is a question of what it is worth on the market.

“A. I would not take less than \$500 an acre for it.

“Court: Would you pay that much for it?

“A. I would if I wanted it; yes.”

Counsel for plaintiff moved to have the answer last quoted stricken out, which was refused, and an exception allowed. John Wise, a neighboring proprietor, testified that he had lived on his place all his life, and had been engaged in farming; that he had heard of a tract about a mile from defendants' land being sold within the preceding two years, but did not state for what it sold. He testified, over objection, that the reasonable value of his own land was about \$800 an acre.

5. Incomplete as the bill of exception is, it is evident that at and about the time of the occupation of this tract by defendants there was little or no active market for lands in its vicinity, and there were few sales by which to fix a standard of market value. Under such circumstances the courts adopt a very liberal rule as to the admission of evidence tending to show value, and very much is left to the discretion of the court. It would seem that under such circumstances persons residing and owning land in the vicinity ought to be presumed to have some knowledge of the value of their own and their neighbors' land without being required technically to qualify as experts.

“It is presumed that a person who has owned and resided upon land for several years is sufficiently familiar with it and with the value of lands in the vicinity to be qualified to testify thereto”: 13 Ency. Ev. 489; *Robertson v. Knapp*, 35 N. Y. 91; *Pinkham v. Chelmsford*, 109 Mass. 225; *Hayden v. Albee*, 20 Minn. 159 (Gil. 143); *Chicago & Rock Island etc. Ry. v. Buel*, 56 Neb. 205 (76 N. W. 571); *Union Pac. R. Co.*

v. *Lucas*, 136 Fed. 374 (69 C. C. A. 218); *Mains v. Haight*, 14 Barb. (N. Y.) 76.

The fact that the land in question was situated in the near vicinity of other lands of the value from \$600 to \$800 an acre, coupled with the additional fact stated in the reply that it was suitable for gardening purposes, furnished at least two of the elements by which the jury might arrive at some approximation as to its value. Such testimony is quite as valuable as that of so-called experts who are brought from a distance, make an examination of the soil and general capabilities, and testify from the data thus obtained. The witnesses seem to have been careful, cautious farmers, not inclined to overestimate their own knowledge, and it is evident that under the circumstances their testimony was the best that could be obtained, and the court did not abuse its discretion in admitting it.

6. That the court committed a technical error in permitting J. R. Penney to state what was offered him for his land and what he demanded, it is true, but it is not probable that this statement substantially injured plaintiff's case. It was merely the witness' crude way of putting a value upon his land. The effect of his whole testimony was merely that he considered his own land worth \$2,500 cash. There is hardly a case tried into which some slight technical error will not creep; and, if appellate courts search microscopically for errors, few cases would go unreversed.

In our opinion this record does not disclose any such substantial error as would justify a reversal, and the judgment is therefore affirmed. AFFIRMED.

MR. JUSTICE BURNETT and MR. JUSTICE EAKIN
absent.

Argued June 12, reversed June 27, 1916.

FRASER v. PORTLAND.

(158 Pac. 514.)

Municipal Corporations—Construction of Sewer—Equitable Estoppel.

1. A land owner who, when advised by a city's representative that a sewer was planned across his land, said he would fight it, and afterward found the sewer had been so constructed, *held* not estopped to demand, in injunction suit, removal of the sewer and cancellation of assessment against his land for the cost of the sewer.

Estoppel—Equitable Estoppel—Acquiescence.

2. Mere silence or "passive acquiescence" does not by itself create an irrevocable license or produce an estoppel.

Injunction—Defenses—Inconvenience to Public.

3. Sometimes equity will decline to enjoin an act, though an admitted legal right has been violated, where intervening public rights would be seriously affected without a correspondingly great advantage to complainant.

Injunction—Sewers—Defenses—Inconvenience to Public.

4. Where a land owner, who, when advised by a city's representative that a sewer was planned across his land, said he would fight it, and afterward found the sewer had been so constructed, and demanded injunction to compel removal of sewer, *held* he was entitled to relief, despite the claim of public inconvenience.

Injunction—Against Maintenance of Sewer—Continuing Wrong.

5. Equity will enjoin the maintenance of an unauthorized sewer across one's land, since it is a trespass producing a continuing wrong.

Municipal Corporations—Injunction—Decree.

6. A municipality was required to remove a sewer constructed without authority across complainant's land, unless, within a reasonable time, right of way therefor was acquired, and to cancel assessment made against complainant for its cost, but without prejudice to any right of reassessment.

[As to waiver of right to injunction by laches in failure to object to improvements, see note in 50 Am. Rep. 117.]

From Multnomah: JOHN S. COKE, Judge.

In Banc. Statement by MR. JUSTICE HARRIS.

John J. Fraser owns a five-acre tract of land in Portland. East Twenty-ninth Street extends north and south and ends in a cul-de-sac at the northeast

corner of the Fraser acreage. Siskiyou Street extends east and west and terminates at the east line of the five-acre tract. If East Twenty-ninth Street should be extended across the land owned by Fraser, a junction would be formed with Siskiyou Street, because what is now the east boundary line of the acreage would by such street extension become the east line of the extended street. The City of Portland constructed a sewer along and to the end of East Twenty-ninth Street, and then over the land of plaintiff, on a line which would be within East Twenty-ninth street if extended, to the end of Siskiyou Street, and thence east along that street. While the sewer was in course of construction, but before the work had reached the Fraser land, George A. Ries, a representative of the city, called upon Fraser on September 18, 1912, for the purpose of acquiring a right of way over his premises. The plaintiff was advised of the fact that the city had planned to lay the sewer across his land. During the interview Fraser told Ries that "he would not under any consideration give a right of way, and if the city attempted to put a sewer across there he would fight it." Prior to the interview between Ries and Fraser a proceeding was commenced for the purpose of extending East Twenty-ninth Street across the Fraser land, and according to the testimony of Ries "the city expected the street would be opened in there for a sewer to be constructed across the property." The city engineer explains the delay in seeing Fraser about a right of way by saying that the municipal authorities were "expecting the city would obtain East Twenty-ninth Street as a street." The attempt to open the street was defeated while the sewer was under construction, and although the city was without a right of way when the work of

construction reached the Fraser land, nevertheless a trench was dug and the sewer laid from the end of East Twenty-ninth Street, across the Fraser property, to the end of Siskiyou Street. The land was occupied by a tenant, and Fraser says he first knew of the sewer being laid on his property when, about a month after the talk with Ries, he "went there and found the sewer had been dug and the pipe laid across my place." Fraser did nothing, except to consult a lawyer, until March 21, 1913, when he filed a writing with the city council demanding the removal of the sewer from his land and objecting to an assessment of \$683.80 which the city proposed to levy on his property to pay for constructing the sewer. In the following May the plaintiff commenced this suit to restrain the defendant from collecting the \$683.80 assessment and to require the removal of the sewer from his premises. A trial resulted in a decree dismissing the suit, and the plaintiff appealed. REVERSED.

For appellant there was a brief over the names of *Mr. Ralph R. Duniway* and *Mr. J. H. Middleton*, with an oral argument by *Mr. Duniway*.

For respondent there was a brief over the names of *Mr. Henry A. Davie*, Deputy City Attorney, and *Mr. Walter P. La Roche*, City Attorney, with an oral argument by *Mr. Davie*.

MR. JUSTICE HARRIS delivered the opinion of the court.

1. The city takes the position that the plaintiff is estopped to ask for the removal of the sewer from his land, because he had notice of the intention of the city to construct the conduit across his property, but

notwithstanding such knowledge he neglected to object until after the completion of the improvement, when the rights of the public had intervened. The city cannot defeat the suit, unless an equitable estoppel can be raised as an insurmountable barrier.

When the city planned the improvement, the municipal authorities assumed that by the time they would be ready to lay the sewer, East Twenty-ninth Street would be extended so as to connect with Siskiyou Street. The attempt to open the street was defeated. The defendant made no move to secure a right of way over the Fraser property until after the work of constructing the sewer had commenced, and when the municipality did move it was told by Fraser that if it attempted to lay a sewer across his land "he would fight it." The city, however, laid the sewer in spite of the notice not to lay it. The trench was dug, the pipe was laid, and the conduit was completed across his property, except filling the trench, when Fraser for the first time knew that the sewer was being constructed across his land. It is true that Fraser said nothing more to the city and made no formal objection until about five months afterward, when he served a written notice to remove the sewer.

2. Nearly every element essential for the creation of an equitable estoppel is wanting. Mere silence, or, in the language of previous judicial opinions, "passive acquiescence," does not by itself create an irrevocable license or produce an estoppel: *Lavery v. Arnold*, 36 Or. 84, 86 (57 Pac. 906, 58 Pac. 524); *Hallock v. Suitor*, 37 Or. 9, 12 (60 Pac. 384); *Ewing v. Rhea*, 37 Or. 583, 587 (62 Pac. 790, 82 Am. St. Rep. 783, 52 L. R. A. 140), expressly overruling *Curtis v. La Grande Water Co.*, 20 Or. 34 (23 Pac. 808, 25 Pac. 378, 10 L. R. A. 484); *Carson v. Hayes*, 39 Or. 97, 107 (65 Pac. 814); *Bolter*

v. Garrett, 44 Or. 304, 307 (75 Pac. 142); *Brown v. Gold Coin Min. Co.*, 48 Or. 277, 284 (86 Pac. 361); *Shaw v. Proffitt*, 57 Or. 192, 202 (109 Pac. 584, 110 Pac. 1092, Ann. Cas. 1913A, 63); *National Fire Alarm Co. v. Portland*, 59 Or. 409, 417 (117 Pac. 285); *Booth-Kelly Lbr. Co. v. Eugene*, 67 Or. 381, 383 (136 Pac. 29). The defendant, however, cannot even claim that Fraser remained silent. He told the city in plain words that he objected and would fight any attempt to lay the sewer across his property. The defendant was a trespasser when it constructed the sewer across the Fraser land.

The owner did not tell the city that it could lay the sewer across his property, and consequently it is not necessary to determine whether an express oral permission, if acted upon, would alone be sufficient to create an irrevocable license, although the following cases may appear to give support to such conclusion: *Garrett v. Bishop*, 27 Or. 349, 353 (41 Pac. 10); *McBroom v. Thompson*, 25 Or. 559 (37 Pac. 57, 42 Am. St. Rep. 806); *Kelsey v. Bertram*, 63 Or. 563, 565 (127 Pac. 777); *Dwight v. Giebisch*, 77 Or. 254 (150 Pac. 749, 752). Since Fraser did not expressly consent to the improvement, the present controversy does not call for an attempt to distinguish expressions found in the last-mentioned cases from, or to reconcile them with, the following adjudications holding that an oral permission does not result in an irrevocable license, unless a consideration is paid by the licensee or some benefit accrues to the licensor: *Lavery v. Arnold*, 36 Or. 84, 86 (57 Pac. 906, 58 Pac. 524); *Hallock v. Suitor*, 37 Or. 9, 13 (60 Pac. 384); *Ewing v. Rhea*, 37 Or. 583, 585 (62 Pac. 790, 82 Am. St. Rep. 783, 52 L. R. A. 140); *Miser v. O'Shea*, 37 Or. 231, 237 (62 Pac. 491, 82 Am. St. Rep. 751); *Bolter v. Garrett*, 44 Or. 304, 307

(75 Pac. 142); *McPhee v. Kelsey*, 44 Or. 193, 200 (74 Pac. 401, 75 Pac. 713); *Sumpter Ry. Co. v. Gardner*, 49 Or. 412, 416 (90 Pac. 499); *Falls City Lbr. Co. v. Watkins*, 53 Or. 212, 215 (99 Pac. 884); *Flinn v. Vaughn*, 55 Or. 372, 376 (106 Pac. 642); *Shaw v. Proffitt*, 57 Or. 192, 204 (109 Pac. 584, 110 Pac. 1092, Ann. Cas. 1913A, 63); *National Fire Alarm Co. v. Portland*, 59 Or. 417 (117 Pac. 285).

Fraser did not in any way aid in the construction of the sewer, and therefore a license cannot be predicated upon his participation in the enterprise: *North Powder Co. v. Coughanour*, 34 Or. 9, 21 (54 Pac. 223); *Bowman v. Bowman*, 35 Or. 279, 281 (57 Pac. 546); *Hallock v. Suitor*, 37 Or. 9, 13 (60 Pac. 384); *Ewing v. Rhea*, 37 Or. 583, 586 (62 Pac. 790, 82 Am. St. Rep. 783, 52 L. R. A. 140). Although the pendency of negotiations for a right of way would not have created a license (*Falls City Lbr. Co. v. Watkins*, 53 Or. 212 (99 Pac. 884); *National Fire Alarm Co. v. Portland*, 59 Or. 409, 413 (117 Pac. 285), still it should be remembered that the defendant was not even negotiating with the owner when the sewer was laid across the Fraser land. Moreover, there is not a word of evidence to indicate that the city relied upon any omission of the owner, or upon any act done or word said by Fraser: *Flinn v. Vaughn*, 55 Or. 372, 376 (106 Pac. 642); *Falls City Lbr. Co. v. Watkins*, 53 Or. 212, 215 (99 Pac. 884). The city was a trespasser from the beginning, and it has entirely failed to establish the elements necessary to the creation of an irrevocable license.

3, 4. The defendant argues, however, that another defense is available, if it is compelled to recede from its position that an irrevocable license was created. The remaining defense interposed by the city arises

out of the contention that the rights of the public have intervened, and the removal of the sewer would inconvenience many and convenience only one person, and that therefore a court of equity should refuse to heed the prayer of the complainant and leave him to his remedy at law. It is true that sometimes a court of equity will decline to raise its restraining arm and refuse to issue an injunction, leaving the injured party to his remedy at law, even though an admitted legal right has been violated, when it appears that the intervening rights of the public should be taken into consideration, and the issuance of an injunction would cause serious public inconvenience or loss without a correspondingly great advantage to the complainant. The rule now invoked by the city as its last defense was applied in *Booth-Kelly Lbr. Co. v. Eugene*, 67 Or. 381 (136 Pac. 29); but there the court dealt with a situation quite different from the one here. Fraser warned the city in time for it to make ample provision for its protection. When the defendant entered the premises of Fraser, it knew that the owner had objected, and that he would continue to object. Fraser did not even tacitly acquiesce, as the plaintiff did in *Booth-Kelly Lbr. Co. v. Eugene*, 67 Or. 381 (136 Pac. 29). No deception was practiced, and nobody was deceived. The city relied on nothing except its expectation that East Twenty-ninth Street would be extended. Fraser did all that he could do, and all that could reasonably be asked of him, and he is entitled to have the assessment canceled, and, unless a right of way is legally acquired within a reasonable time, to have the sewer removed.

5. A court of equity is empowered to grant the relief asked by the plaintiff, because the act complained of produced a continuing wrong: *Bernard v. Willamette*

Box & Lbr. Co., 64 Or. 223, 233 (129 Pac. 1039); *Bourne v. Wilson-Case Lbr. Co.*, 58 Or. 48, 52 (113 Pac. 52, Ann. Cas. 1913A, 245); *Moore v. Halliday*, 43 Or. 243, 247 (72 Pac. 801, 99 Am. St. Rep. 724); 1 High, Inj. (4 ed.), p. 663.

6. Assuming that it is within the power of the city to condemn the land, or to extend East Twenty-ninth Street, or in some lawful manner acquire the right to maintain the sewer, a decree should be entered requiring the city to remove the drain, unless within a reasonable time the defendant acquires a right of way for the sewer, but with directions to the Circuit Court to ascertain what would be a reasonable time, and canceling the assessment attempted to be made against the plaintiff for the improvement, without prejudice, however, to any right that the municipality may have to levy a reassessment: *Iron Works v. Oregon R. & N. Co.*, 26 Or. 224, 234 (37 Pac. 1016, 46 Am. St. Rep. 620, 29 L. R. A. 88); 2 Lewis, Eminent Domain (3 ed.), p. 1632.

A decree will therefore be entered in conformity with this opinion.

Submitted on brief July 5, affirmed July 10, 1916.

STAPLES v. ASTORIA.

(158 Pac. 518.)

Elections—Notice—Condition Precedent.

1. The notice of a special election required by law to be given constitutes a condition precedent, which must be observed to validate matters voted upon at such election.

Municipal Corporations—Initiative and Referendum—Failure to Publish Notice.

2. Where an ordinance requires the publication of a notice of a proposed initiative measure, amending the city charter, for a certain time, failure to publish such notice at the required time will vitiate the amendment.

Municipal Corporations—Initiative and Referendum—Notice—Publication.

3. Under Ordinance 4799 of the City of Astoria, touching notice of a special election at which charter amendments were to be submitted, where February 16th and 17th, more than 30 days prior to such an election and after passage of the ordinance proposing the amendment and containing its text, the officers of the city posted 82 notices of the election in the different wards, and caused a notice of election containing the charter amendments to be published in the official newspaper of the city once each day for 12 successive issues, the first insertion appearing March 1 and the last March 14, 1916, the election being held March 22, 1916, there was a compliance with the ordinance.

[As to the necessity for notice or proclamation of election, see note in 120 Am. St. Rep. 794.]

From Clatsop: JAMES A. EAKIN, Judge.

In Banc. Statement by MR. JUSTICE BEAN.

This is a suit by Norris Staples to enjoin the City of Astoria from issuing and negotiating \$50,000 in municipal bonds. From a decree in favor of defendants, plaintiff appeals. The amendment to the city charter, authorizing the proposed bond issue, among several other amendments, was adopted by a vote of the electors of the municipality at a special election held therein on Wednesday, March 22, 1916. The plaintiff is a taxpayer of the City of Astoria. He pleaded the various ordinances providing for such city election, the notice of election, and all proceedings connected therewith.

The defendants filed a demurrer to the complaint, which the court sustained, and dismissed the suit.

Submitted on briefs under the proviso of Supreme Court Rule 18: 56 Or. 622 (117 Pac. xi).

AFFIRMED.

For appellant there was a brief submitted by *Mr. Clarence J. Curtis*.

For respondents there was a brief prepared and presented by *Mr. A. W. Norblad*, City Attorney, and *Mr. Frank C. Hesse*, Deputy City Attorney.

MR. JUSTICE BEAN delivered the opinion of the court.

Plaintiff contends that the special election was null and void on account of the insufficiency of the notice given therefor by failing to publish the same in at least 10 issues, all within two weeks immediately preceding said special election, as provided by Ordinance No. 4799; the first notice having been published on March 1, 1916, and the last on the 14th of that month. The common council of the city regularly adopted an ordinance proposing the amendment to its charter so as to authorize the bond issue. The time and manner of giving notice of a special election held for the purpose of submitting a proposed amendment to the city charter is provided by Section 4 of Ordinance No. 4799, as follows:

“Whenever the common council has passed an ordinance or ordinances providing for the submission of proposed amendments to the electors of the City of Astoria, at a special election, and an ordinance has been passed by said city council providing for such special election, the auditor and police judge of said city shall at least 30 days prior to the time when said election is to be held, cause notices thereof to be given to the electors of said city, by posting fifty (50) notices announcing the passage of the ordinance containing the text of such proposed amendment and to cause five (5) or more of such notices to be posted in conspicuous places in each ward of the said City of Astoria, and a notice stating the time and place of election, and said auditor and police judge shall cause such notice containing the text of said proposed amendment, stating the time and place of said special election to be pub-

lished in the official newspaper of said City of Astoria, in at least ten issues within two weeks prior to said special election.”

The notice of election was as follows:

“Notice of Special City Election to be Held March 22,
1916,

“And Amendments to the City Charter to be Voted
upon.

“Notice is hereby given that on the 22d day of March, A. D. 1916, a special election will be held in and for the City of Astoria, Clatsop County, State of Oregon, at which time amendments to the charter of the City of Astoria, Oregon, will be voted upon by the legal electors of said city, said amendments being proposed by ordinances of the City of Astoria, passed by the common council thereof, containing an emergency clause and approved by the mayor of said city, and referred to the people of the City of Astoria, Oregon, for their approval or rejection, by the common council of said city; the text, and form in which said amendments will appear upon the ballot being as follows [all of which are set forth].”

The title to the amendment authorizing the bond issue is ordained in the following language:

“Section 4. The title of the proposed amendment, as hereinbefore set forth, to be voted upon at such special election shall be as follows: An act to amend Section 132 of the existing municipal charter of the City of Astoria; providing a limit of indebtedness of said city and the issuance of bonds in the sum of \$50,000.00 to fund outstanding city warrants. * * All as per order of common council of the City of Astoria.

OLOF ANDERSON,

“Auditor and Police Judge.”

It appears from the record that on February 16th and 17th, more than 30 days prior to the date of the election, and after the passage of the ordinance pro-

posing the amendment and containing the text thereof, the officers of the city posted 82 notices in the different wards of the city, conforming to the requirements of the ordinance, and caused a notice of the election containing the charter amendments to be voted upon to be published in the "Astoria Daily Budget," the official newspaper of the city, "once each day for 12 successive issues," the first insertion appearing March 1, 1916, and the last March 14, 1916. The claim of the plaintiff is that the last publication should have been on March 18th of that year.

1, 2. It is the rule in this state that at a special election the notice thereof required by law to be given constitutes a condition precedent which must be observed in order to validate measures voted upon at such an election: *Marsden v. Harlocker*, 48 Or. 90 (85 Pac. 328, 120 Am. St. Rep. 786); *Guernsey v. McHaley*, 52 Or. 555 (98 Pac. 158). Where an ordinance requires the publication of a notice of a proposed initiative measure for a certain time, the failure to publish such a notice at the required time will vitiate the amendment: *State v. Dalles City*, 72 Or. 337 (143 Pac. 1127); *Wright v. City of McMinnville*, 59 Or. 397 (117 Pac. 298); *State v. Sengstacken*, 61 Or. 455 (122 Pac. 292, Ann. Cas. 1914B, 230). Section 9 of Ordinance No. 4799 of the city charter provides as follows:

"The provisions of this ordinance are directory only, and substantial compliance with the spirit and intent of this ordinance shall be sufficient."

In 9 R. C. L., page 992, it is stated:

"And it is equally clear in the case of special elections wherein the necessity for notice is so much more urgent, that the rule as to compliance with statutory requirements in the giving of notice should be much more strictly enforced. Considerable liberality is,

however, allowed even in these elections, and it is a rule of pronounced authority that the particular form and manner pointed out by a statute for giving notice is not essential, provided, however, there has been a substantial compliance with statutory provisions. * * This liberal rule is based upon the theory that where the people have actually expressed themselves at the polls the courts are strongly inclined to uphold rather than to defeat the popular will. But there must be at least a substantial compliance with the statutory provisions in order that the notice may be held to be constructive."

3. It seems to us that this important question is solved by asking and answering the following interrogatories, developing the meaning of Section 4 of Ordinance 4799: (1) Who is to cause the notice of such an election to be given? A. That duty devolves upon the auditor and police judge. (2) At what time before the election must such notice first be made public? A. The ordinance directs that it be published by posting at least 30 days prior thereto. (3) For what time or how many times shall the notice be published in the official newspaper? A. In at least 10 issues. (4) At what period prior to the date for balloting should the last publication in the official newspaper be made? A. At some time within the two weeks prior thereto. The same meaning would be conveyed by stating that such publication should be not more than two weeks before the election. These seem to be the essential requirements ordained by the city as to the time and manner of publishing a notice to the electors of the city. The object of the last specification as to the time was evidently made in order that the publication of the notice should not be completed at a date so long prior to the time fixed for the voting that the same would be likely to escape the memory or

attention of the electors, but, on the contrary, would be fresh in their minds. The notice in question fulfilled the requirements of the ordinance in this respect, and also as to the substance thereof. It was sufficient and valid to authorize the election. It might make Section 4 of the ordinance read more smoothly if the last clause should be framed so as to read "in at least 10 issues (and) within the two weeks." It is the substance of the notice, and not the phraseology, that should be considered. When the intent of the law-makers and the object and purpose of the law are plainly manifest, and the same are not inconsistent with or outside the terms of the law, it is not permissible to defeat the intent and purpose merely because they are not defined and declared in the most complete and accurate language: Black, Interpretation of Laws, § 35, p. 73.

In the present case we think the notice and publication thereof may be said to be a strict compliance with the requirements of the ordinance, which properly directs the manner of giving notice of special elections. From a careful examination of the record and the proceedings leading up to and constituting the special election amending the charter of the City of Astoria so as to authorize the issuance of the \$50,000 in bonds, we find a fair and strict compliance with the requirements of the law governing the same. The position of the plaintiff is not well taken.

The decree of the lower court sustaining the demurrer to the complaint and dismissing the suit was therefore correct, and should be affirmed; and it is so ordered.

AFFIRMED.

MR. JUSTICE EAKIN took no part in the consideration of this case.

MR. JUSTICE HARRIS delivered the following dissenting opinion:

The special election was held on March 22, 1916. The proof of publication shows that the notice of the special city election was published in a newspaper "once each day for 12 successive issues, the first insertion in the issue of March 1, 1916, the last in the issue of March 14, 1916." Two Sundays, the fifth and twelfth days of the month, are included in the first 14 days of March, and it is probable that this circumstance affords the explanation for the 12 publications during the period of 14 days. "Two weeks prior to said special election" would commence with March 8th. Assuming, therefore, that the notice was published each day, except Sundays, from the 1st to the 14th, then it follows that there were only six publications within the two weeks prior to the special election. The ordinance requires that the notice shall be published in the official newspaper "in at least ten issues within two weeks prior to said special election." There must be 10 publications, and those 10 publications must all be within a period of two weeks immediately preceding the election, and the language "within two weeks prior to said special election" cannot, in my opinion, reasonably and fairly be given any other interpretation. Six publications are only one more than half the requisite number. Notice is jurisdictional. I cannot concur in the conclusion that there has been a strict compliance with the ordinance because, as I read the record, there was not even a substantial compliance with the plain requirements of the ordinance. Manifestly the very design and purpose of publishing "ten issues within two weeks prior to said special election" is to keep fresh in the minds of

the voters the fact that an election is to be held. The time of the publication is just as essential as the number of publications. In my opinion the decree should be reversed.

MR. JUSTICE BURNETT concurs in this dissent.

Motion to dismiss appeal denied February 29, 1916.
Argued on the merits June 1, reversed June 13, rehearing denied July 11, 1916.

WHITE v. EAST SIDE MILL CO.*

(155 Pac. 364; 158 Pac. 173; 158 Pac. 527.)

Appeal and Error—Filing Brief—Timeliness.

1. Where the Supreme Court extended the time for filing appellant's brief to and including February 12th, on which date appellant filed its brief, showing service of a copy on February 11th, the brief was filed in time.

Pleading—Reply—Denial—Negative Pregnant.

2. In action for death from negligent operation of defendant's auto truck, a reply consisting of conjunctive denials of conjunctive allegations of contributory negligence was insufficient as a denial thereof.

Pleading—Denial—Negative Pregnant.

3. Material facts alleged conjunctively must be denied disjunctively.

Pleading—Denials—Sufficiency.

4. Denial that plaintiff's decedent carelessly or negligently stepped in front of defendant's truck, or failed to look out for his safety, is not a denial of doing such acts, but only of the manner of doing, especially where by demurrer, or by motion for judgment on the pleading, plaintiff's attention was directed to the deficiency of the allegation, which he refused to cure.

Appeal and Error—Scope of Review—"Error Committed During the Trial."

5. Plaintiff's denial that her decedent carelessly stepped in front of a truck, or negligently failed to look out for his own safety, pre-

*As to effect of general denial on necessity for proving freedom from contributory negligence, see note in 33 L. R. A. (N. S.) 1157.
REPORTER.

senting a deficiency of pleading, is not an "error committed during the trial," within the provisions of Article VII, Section 3, of the Constitution, requiring affirmance in spite of such errors.

Appeal and Error—Scope of Review—Constitutional Provisions.

6. Article VII, Section 3, of the Constitution, requiring affirmance, notwithstanding errors committed during the trial, if the judgment was such as should have been rendered, is not intended to authorize courts to disregard statutes requiring sufficient pleadings or other preliminaries to trial.

From Multnomah: HENRY E. MCGINN, Judge.

In Banc. Statement by MR. JUSTICE HARRIS.

This is an action by Lulu B. White, administratrix of the estate of James R. White, deceased, against the East Side Mill & Lumber Company, a corporation.

The defendant appealed from a judgment which was favorable to the plaintiff, and the latter has filed a motion to dismiss the appeal, claiming that the appellant has not filed its brief within the prescribed time.

DENIED.

Mr. R. A. Sullivan, for the motion.

Messrs. Asher & Johnstone, contra.

MR. JUSTICE HARRIS delivered the opinion of the court.

1. This court extended the time for the filing of the brief to and including February 12, 1916. On February 12th the defendant filed its brief showing service of a copy on February 11th. The brief was therefore filed in time, and the motion is denied.

DENIED.

MR. JUSTICE EAKIN took no part in the consideration of this case.

Reversed June 13, 1916.

ON THE MERITS.

(158 Pac. 173.)

Department 1. Statement by MR. JUSTICE McBRIDE.

This was an action to recover damages for a personal injury to plaintiff's intestate, whereby he lost his life. The complaint alleged, in substance, that the deceased was a traffic policeman of the City of Portland; that in the performance of his duty to regulate traffic he was standing in the middle of the intersection of East Burnside Street and Union Avenue, and that an auto truck of defendant driven by one Mergens was carelessly and negligently driven against him, causing his death; that it was the duty of the driver of said truck to proceed at a reasonable speed, but instead of so doing he drove the same recklessly and negligently, and in utter disregard of the safety of deceased, and at a rate of speed which was greater than was safe and proper; that in driving said truck from Union Avenue east on said Burnside Street it was the duty of defendant's driver, while said auto truck was being so turned to the left, and so run from Union Avenue east on Burnside Street, to run to and beyond the center of the intersection of such streets, at which point the said James R. White was then and there standing and directing said traffic as a police officer; that notwithstanding this duty the defendants, acting by and through its said agent, servant and employee did not drive the said auto truck beyond the center of the intersection of such streets, but drove and operated the said auto truck directly over and across the center of the intersection of the said streets and directly over and across the point at which the

said James R. White was then and there standing, and in so doing the said auto truck ran into and struck the said James R. White and knocked him with great force to the pavement, causing the injuries which resulted in his death. It is further alleged that the seat upon which the said Mergens was sitting while so operating said auto truck was inclosed at the rear and on both sides with a hood, which prevented the driver from looking to the rear or to either side of the auto truck and from seeing the condition of the traffic on said streets, and in so having and maintaining such hood around said seat the defendant acted negligently and carelessly and in disregard of the safety of the deceased, which directly caused the injury.

The defendant answered, admitting that the deceased was killed by collision with the truck driven by its employee, but denied the allegations of negligence and want of care on the part of its driver. There was also a plea of contributory negligence, which was, in substance, as follows: That on or about November 17, 1914, at about 6:15 or 6:30 p. m. of said day, one James R. White was acting as police officer of the City of Portland, Oregon, directing traffic in accordance with the traffic ordinances of the City of Portland at the intersection of Union Avenue and East Burnside Street in said City of Portland; that at that time an auto truck, belonging to defendant and driven by one of its employees, to wit, Alfred Mergens, was by said Mergens driven southward upon said Union Avenue on the right hand or west side of the street; that when said auto truck reached a point on Union Avenue near the northwest corner of such avenue and East Burnside Street, and north of East Burnside Street, Mergens stopped the auto truck belonging to defendant; that James R. White was standing at or near the inter-

section of the streets, and gave signals to Mergens to proceed; that Mergens, after receiving the signals from said White to proceed, started up at a slow, safe and reasonable rate of speed, and at such rate of speed nearly crossed East Burnside Street, and, after passing well beyond the middle of such street, turned to the left and toward the east, in order to proceed eastward along East Burnside Street; that after giving the signals to Mergens to proceed the deceased carelessly and negligently turned his back upon Mergens and looked in a southerly direction, giving signals to vehicles which were stopped on Union Avenue south of East Burnside Street and directing them to advance northward; that as said Mergens, driving defendant's auto truck, passed around him, he carelessly and negligently kept his back turned to said auto truck, and after the front wheels of it had passed by deceased, and while the eyes and attention of Mergens were fixed forward and toward the east on East Burnside Street, in order to proceed carefully eastward along that street, said White carelessly and negligently stepped backward in front and directly in the path of the moving rear wheels of the auto truck, which struck him, knocked him down and inflicted upon him the injuries which resulted in his death; that deceased was guilty of contributory negligence which caused the accident and injuries referred to, in that, although he had notice and full knowledge of the dangerous position in which he was acting as traffic officer on a vehicle filled street in the congested district of the City of Portland, and although he knew and fully appreciated the danger of failing to look out for himself and to keep a careful watch over the passage of traffic of all kinds at the said intersection, he nevertheless carelessly and negligently turned his back upon defend-

ant's auto truck, and failed to look out for the danger of being struck by it, or some part thereof, or by some other vehicle which might be passing in compliance with his signals and directions.

The reply denied the matter in the answer in practically the following terms: The plaintiff admits the allegations contained in paragraph 2 of the answer, except that she denies the said James R. White gave signals to Mergens to proceed, that Mergens started at a slow, safe and reasonable rate of speed, and that he passed well beyond the middle of East Burnside Street before turning to the left and toward the east; and she further denies that the deceased carelessly and negligently turned his back upon Mergens, or carelessly and negligently looked in a southerly direction, that Mergens, driving the defendant's auto truck, passed around deceased, that deceased carelessly and negligently kept his back turned to the auto truck, and that the said White carelessly and negligently stepped backward in front and directly in the path of the moving rear wheels of the auto truck as alleged. The plaintiff denies that the said James R. White was guilty of contributory negligence, and that he failed to look out for himself and to keep a careful watch over the passage of traffic on said streets, and denies that he carelessly and negligently turned his back on defendant's auto truck, and failed to look out for the danger of being struck by the auto truck, or any part thereof, or any other vehicle which might be passing in accordance with his signals; and she alleges the facts to be as set forth in her complaint heretofore filed, and not otherwise.

Defendant demurred to the reply, for the reason that it did not state facts sufficient to constitute a defense to the new matter in defendant's answer, and in

accordance with the rules of the Circuit Court of Multnomah County gave the following notice of the points upon which it would rely on the hearing of the demurrer:

“Upon the hearing of this demurrer defendant will submit that said reply to which the demurrer is directed, being conjunctive in form, is therefore pregnant with admissions of the allegations contained in the affirmative answer of defendant, and hence does not constitute a denial in law of said affirmative defense.”

The demurrer was overruled, and upon the trial a verdict was had, from which defendant appeals.

REVERSED.

For appellant there was a brief over the name of *Messrs. Asher & Johnstone*, with an oral argument by *Mr. Hamilton Johnstone*.

For respondent there was a brief and an oral argument by *Mr. R. A. Sullivan*.

MR. JUSTICE McBRIDE delivered the opinion of the court.

2, 3. We greatly regret being compelled to reverse this case upon a question of pleading, but we see no way to avoid doing so without violating all the established rules of pleading, both as prescribed by the Code and as they existed at common law. The rules of pleading under our Code are plain and easily followed. A party may make a general denial of all the allegations of a pleading, except such as he wishes to admit, or he may make a specific denial of each. It is a rule everywhere and under all systems of pleading that, where several material facts are alleged

conjunctively, the denial must be so specific as to indicate the intent of the pleader to deny all of such allegations, and it is the universal rule that material facts alleged conjunctively must be denied disjunctively. Mr. Bliss states the reason for this rule in the following language:

“There is a special reason, in states in which it is necessary to make oath to pleadings, why a negative pregnant should not be tolerated. No one could be convicted of perjury who should swear to such a denial, as it is uncertain what fact he intended to deny”: Bliss on Code Pleading, § 332.

The question is settled in this state in the case of *Scovill v. Barney*, 4 Or. 288. In that case the complaint alleged that the plaintiff on February 15, 1870, “was mentally infirm *and* not of sound mind, *and* so insane as to be *wholly* incapable of attending to business.” The denial was as follows: “Defendant also denies that at the date of the 15th of February, 1870, the plaintiff was mentally infirm *and* not of sound mind, *and* so insane as to be *wholly* incapable of attending to business.” The court held the denial to be insufficient. In *Moser v. Jenkins*, 5 Or. 447, which was in replevin, the complaint alleged in substance, that upon a certain date the defendant wrongfully took *and* detained certain goods, the property of plaintiff, and that he still unjustly detains the same. The reply was as follows: Denies “that on and ever since the tenth day of April, 1875, the defendant wrongfully took *and* detained said goods and property from this plaintiff”; denies “that he still *unjustly* detains the same.” The court held that the denials were insufficient to raise any issue, and were virtual admissions of the truth of the allegations of the complaint. The subject will be found treated at length, with copious

citations, in 1 Sutherland on Code Pleading, Sections 417, 418.

The reply in the case at bar consists wholly of conjunctive denials. It denies that deceased failed to look out for himself *and* keep a careful watch over the traffic on said street, which in its final analysis is an admission that he might have been negligent in one or the other of these respects. It denies that he *carelessly* and *negligently* turned his back on the defendant's auto *and* failed to look out for danger of being struck, which is entirely consistent with the theory that he might have turned his back to the approaching truck, but that the act was not done in a careless or negligent manner, or that he might have turned his back without negligence and yet have failed to look out for danger of being struck. It denies that he *carelessly* and *negligently* stepped back in front and directly in the path of the moving rear wheels of the auto truck, which amounts to an admission that he stepped backward in front and directly in the path of the truck, but that he did not do it negligently and carelessly. This is exactly the class of denials condemned by the cases above cited and explicitly declared by them to raise no issue. The plaintiff should have confessed the demurrer and obtained leave to amend, which would have been cheerfully granted by any court. Having persistently refused to do this, we cannot remedy the omission here. This court has been exceedingly liberal in regard to defects in pleading, but it cannot extend that liberality so far as to condone the omission of material averments or denials. This view of the case renders it unnecessary to consider the other questions so ably discussed upon the hearing.

The judgment is reversed and the demurrer to the reply sustained, and the cause remanded to the Circuit Court, with leave to plaintiff to apply there for permission to amend her reply. **REVERSED.**

MR. CHIEF JUSTICE MOORE, MR. JUSTICE BURNETT and MR. JUSTICE BENSON concur.

Denied July 11, 1916.

ON PETITION FOR REHEARING.

(158 Pac. 527.)

Mr. R. A. Sullivan, for the petition.

Messrs. Asher & Johnstone, contra.

Department 1. MR. JUSTICE McBRIDE delivered the opinion of the court.

4. It was wholly unnecessary for counsel in his petition for a rehearing to dwell upon the inconveniences to which his client will be subjected by a retrial of this case. These were fully weighed and their necessity deplored when the case was considered. This court, being composed of persons having at least the ordinary modicum of human sympathy, would gladly have overlooked any error of the court below which did not involve the violation of a plain provision of the statute. But it is plain, and every lawyer is cognizant of the fact, that a denial that a person "carelessly" did an act is not a denial that he did the act, and a denial that a person "negligently" failed to look out for his safety is not a denial that he actually failed to do so, but goes only to the manner in which he failed. Both as a matter of grammar and as a matter of law the doing of the act charged

is not denied; the denial going merely to the manner in which the act was done, and not to the fact that it was actually performed. So in this case it was admitted, by failing to deny, that the deceased stepped back directly in the path of the moving wheels of the truck, and that he failed to look out for himself and turned his back upon the truck.

But it is said that it is plain that the plaintiff intended to deny these allegations. How plain? The notice accompanying the demurrer pointed out these very defects, which, as shown in the original opinion, could have been remedied in half an hour by an amendment, and plaintiff's counsel refused to correct them. They were again called to his attention by a motion for judgment upon the pleadings, made before the trial began, and again he failed to avail himself of an opportunity to amend. It is apparent that defendant was objecting at every stage of the case to trying it upon these defective pleadings. Now, the appeal brings up the case to be heard upon the questions raised in the court below, and the very first question which confronts us is defendant's demurrer to plaintiff's reply. That it was well taken and should have been sustained is unquestionable. That we followed the decisions of our own court, made when the statute, except for the provision with respect to general denials, was substantially as it is now, is admitted. Pleading in this state is not regulated by the common law, but by statute, and the decisions in this state were made upon the statute; and an examination of the authorities shows that in all the Code states where the subject has been discussed denials of the character here considered have been held insufficient to raise an issue. Our conclusion, therefore, is not a resurrection of an ancient rule of common-law plead-

ing, but the enforcement of a plain requirement of the statute, and all the industry of counsel has not discovered a single case holding a contrary view.

5, 6. This is not a case of an error "committed during the trial," and, therefore, within the provisions of Article VII, Section 3, of our present Constitution. If the writer of this opinion knows anything about that provision, and he assisted in framing it and has diligently sought to apply it, it was not intended to authorize the courts to disregard statutes requiring sufficient pleadings or other preliminaries to a trial. The mistake here did not occur at the trial, but before the trial. It was not a casual inadvertence, such as a judge in the hurry of a jury trial may commit in ruling upon an objection to testimony; neither was it an error which was not called to the attention of counsel before the trial commenced. Every party to an action is entitled to demand that the issues shall be clearly stated in the pleadings before his cause is put upon trial. Such demand was seasonably made in this case, and plaintiff's attorney refused to deny plainly and explicitly, and in contemplation of law to deny at all, the material averments of the answer. This is not a question of fanciful distinctions between the conjunctions "and" and "or," nor is it a question of definition of the adverbs "negligently" and "carelessly." It is a question as to whether certain allegations of the complaint have been denied. A very short word may change the whole meaning of a sentence. Eliminate the little adverb "not" from the Ten Commandments and there remains an injunction to commit the very offenses there prohibited. A law requiring an offender to be fined "and" imprisoned would not be complied with by inflicting a

fine and omitting the imprisonment, and *vice versa*. One requiring an offender to be fined "or" imprisoned would be violated by inflicting both fine and imprisonment. The distinction is so plain it is seldom that pleaders overlook it; and there is a reason for the fact, referred to in counsel's brief, that the only decisions cited in the opinion are away back in the fourth and fifth volumes of the Oregon Reports. That reason is that few attorneys have committed the same error, but it may be noted that in *McCormick Machine Co. v. Hovey*, 36 Or. 259 (59 Pac. 189), in an opinion by WOLVERTON, C. J., it was held that a denial of the character here indicated raised no issue, and that ruling was followed in *Minter v. Minter*, 80 Or. 369 (157 Pac. 157).

The petition for rehearing is denied.

REVERSED. REHEARING DENIED.

MR. CHIEF JUSTICE MOORE, MR. JUSTICE BURNETT
and MR. JUSTICE BENSON concur.

Argued March 29, reversed April 18, rehearing denied July 11, 1916.

PHIPPS v. MEDFORD.

(156 Pac. 787; 158 Pac. 666.)

Municipal Corporations—Public Improvements—Assessments for Benefits—Notice—Curative Act.

1. Though a city charter provided for notice to adjacent property owners at least ten days before commencing construction of a sewer, a sewer having been constructed without such notice an initiative amendment to the charter providing for the levy on realty for sewers after construction, was valid, and applied to such sewer, as it would have been permissible in the first place to allow construction without previous notice, and it being within legislative power by subsequent enactments to dispense with or obviate any previous provision which might have been originally omitted.

Municipal Corporations—Public Improvements—Assessments—Exercise of Legislative Discretion—Review by the Courts.

2. In a suit to remove a cloud from the title of real estate said to consist of an assessment attempted to be levied to pay for the sewer, in the absence of fraud or criminality on the part of the city officials, the assessments of the tax being an exercise of municipal power referable to the legislative discretion of the city council, a fault in the construction of the sewer is not open to the court's inquiry.

Municipal Corporations—Public Improvements—Assessments—Decree of Invalidity—Reassessment.

3. A decree of the court declaring void an assessment of taxes upon adjacent owners for construction of a sewer affected only the assessment there involved, and cannot prevent any future levy under the charter as amended by Section 132a, providing for levy on adjacent realty for sewers after construction.

Municipal Corporations—Amendment of Charter.

4. Under Article XI, Section 2, of the Constitution, conferring power upon the voters of every city or town to amend their charters, to the extent that a legislative charter is inconsistent with a change wrought by the legal voters in that instrument, the latter expression of the legislative power vested in them must prevail.

Attorney and Client—Conduct—Presentation of the Case.

5. It is the attorney's duty, without flattery or scurrility, to present his view of the law, irrespective of an adverse ruling of the court.

Municipal Corporations—Public Improvements—Special Assessments—Assessments for Completed Work.

6. The initiative amendment to the charter of Medford is a valid exercise of municipal power to levy special assessments, although it provides for levying an assessment for work already executed.

Municipal Corporations—Charter Provisions—Construction.

7. Where an initiative municipal charter provision was so designed as to embrace the whole subject matter and was in conflict with the legislative charter, the earlier enactment yields to the later.

Municipal Corporations—Public Improvements—Special Assessments—Time of Assessment.

8. Under Medford Charter, Section 132a, providing that, regardless of defects in former proceedings, the common council may commence anew and proceed to levy an assessment for the improvement, it is not necessary for assessment after completion of the improvement that there shall have been an earlier and defective proceeding, but the assessment may be made at any time after the improvement.

Constitutional Law—Scope of Judicial Review—Policy of Law.

9. The court is not concerned with the policy of the initiative and referendum system, but must construe such laws and laws enacted thereunder as it finds them.

[As to judicial inquiry into motives prompting enactment of ordinance relating to local improvement, see note in *Ann. Cas.* 1912A, 718.]

Municipal Corporations—Improvements—Reassessments—Statute.

10. Medford Charter, Section 132a, providing for reassessment in case of defective proceedings on proper notice and after time is fixed for considering protests, is a proper exercise of the legislative power, committing such hearing to the municipal council.

Municipal Corporations—Improvements—Assessments—Decision of Council—Collateral Attack.

11. In a suit to remove a cloud from plaintiff's title alleged to result from the action of the municipal council assessing a tax for municipal improvements, its decision must be respected on collateral attack, in the absence of allegation of fraud in the procedure.

From Jackson: FRANK M. CALKINS, Judge.

Department 1. Statement by MR. JUSTICE BURNETT.

This is a suit by W. E. Phipps and others against the City of Medford to remove a cloud from the title to the real property of the plaintiffs. It is said to consist of an assessment attempted to be levied by the municipal defendant upon the holdings of the plaintiffs within its boundaries to pay for a sewer which had been laid in that city. It is claimed that the rating was void because the municipality had not given notice prior to the commencement of the improvement calling upon the property holders to show cause why the same should not be constructed. As an additional cause of suit, the complaint alleges the result of former litigation to remove a cloud growing out of the same transaction, whereby the court declared the impost void, and this is relied upon as *res adjudicata* estopping the defendant from enforcing the levy here involved.

The answer admits that no notice was given prior to the initiation of the work, but it counts upon subsequent provisions of the charter which the city says authorizes its council to reassess property for an improvement of the kind actually made, either when the former assessment has been declared void, or when the council in its own opinion shall conclude it is illegal or

of doubtful validity. From a decree according to the prayer of the complaint, the defendant appeals.

- REVERSED.

For appellant there was a brief and an oral argument by *Mr. B. R. McCabe*.

For respondents there was a brief and an oral argument by *Mr. W. E. Phipps*.

MR. JUSTICE BURNETT delivered the opinion of the court.

1. It is admitted that by the charter of the City of Medford, enacted by the legislative assembly of the state February 7, 1905, the city is empowered to construct all necessary sewers of sufficient capacity to produce a complete system of drainage; to cause the expense thereof to be visited upon the property directly benefited by and adjacent to the same; to declare by ordinance the manner of carrying said assessment into full effect; and that the charter on that subject has this provision:

“The council shall provide by ordinance that the owners of said adjacent property shall be served by notice by the city recorder at least ten days before the beginning of the construction of said sewer, drain or ditch, calling upon such property owners as are adjacent thereto and benefited thereby to appear before said council and show cause if any, why said property should not be assessed for the construction of said sewer, drain or ditch, and in the event that the said or any property owner or owners shall see fit to protest against the construction of said sewer, drain or ditch, the said council shall at such time as it may appoint, consider said protest,” etc.

Without giving the notice prescribed in the excerpt just quoted, the city actually made the improvement in

question in 1910 and 1911. The defendant avows that the sewer had been constructed and was in actual use and operation for nearly three years before the ordinance now under consideration was adopted to enforce a tax for the payment of the expense thereof. The charter, however, contains this provision, enacted by the legal voters of the city under the initiative process:

“Sec. 132a. Whenever heretofore or hereafter the council has caused, or may cause, any street or alley to be improved, or has caused any sewer or water-main to be laid and has, or may hereafter assess or attempt to assess upon the property adjacent thereto or benefited thereby the cost of such improvement, and said assessment by reason of any failure to give any requisite notice or by reason of any other defect in the proceedings leading up to the making of such improvement or the levying of such assessment shall be declared to be void by any court, or if the council shall be of the opinion that said assessment is illegal or doubtful by reason of any such omission or defect, said council may cause the cost of said improvement to be reassessed against the property adjacent to said improvement or benefited thereby, in the following manner: The council shall declare by resolution its intention to make such reassessment, which resolution shall briefly describe the improvement, and shall declare the intention of the council to assess the cost thereof upon the property adjacent to said improvement, or benefited thereby, describing in said resolution each parcel of property which it intends so to reassess and the amount it proposes to assess against each parcel. Said resolution shall fix the time and place for holding a meeting of the council at which all protests against reassessing the cost of said improvement against adjacent property, or property benefited thereby, shall be heard. Said resolution shall be published three times in a newspaper published and of general circulation in said city, and shall be posted in five public places in said city, at least ten days before the date of said meeting.”

The city recites in detail in its answer all its proceedings under Section 132a, and the record shows a sufficient compliance with the same. The decree pleaded as an estoppel by the plaintiffs does not refer to the last assessment, but prevents the enforcement of one made indeed after the sewer had been completed but before the one now involved; it being the fact as shown by the record that two assessments had been attempted, both after the accomplishment of the work. The crucial question of the case is whether, in face of the provision for previous notice found in the legislative charter, the city, by virtue of the initiative amendment called Section 132a, could lawfully levy upon realty to pay for a sewer constructed as this one was without having given previous notice to the property holders.

It is a conceded fact that the sewer actually has been constructed by the city. It would have been permissible in the first place to provide by charter that the city could do this without notice to anybody, and that, it having been completed, the municipal authorities could call upon the adjacent property holders ratably to meet the expense, always provided that at some stage in the proceedings the taxpayer should have the right and opportunity to be heard before the exaction was visited upon him whereby he might be deprived of his estate. It is within the legislative power by subsequent enactment to dispense with or obviate any previous provision which might have been omitted originally in such proceedings, and such is the rule laid down in *Thomas v. Portland*, 40 Or. 50 (66 Pac. 439); *Duniway v. Portland*, 47 Or. 103 (81 Pac. 945); *Hughes v. Portland*, 53 Or. 370 (100 Pac. 942); *Mills v. Charleston*, 29 Wis. 400 (9 Am. Rep. 578); *Schintgen v. La Crosse*, 117 Wis. 158 (94 N. W. 84); *Smith v. Detroit*,

120 Mich. 572 (79 N. W. 808). This the city has done by the initiative charter amendment. Such legislation is designed to compel payment for improvements by real estate which is actually and equitably benefited thereby. It is referable to the taxing power of government, which is an attribute of sovereignty. The municipality, endowed with that function, is entitled to pursue its object with the pertinacity of a nemesis until it attains its purpose regardless of objections which do not measure up to the standard of equity and good conscience. This power is attended by and is subject to the constant condition that at some point in their effort to lay a tax upon property the owner thereof must have an opportunity to be heard, so that his holding shall not be taken from him nor burdened without due process of law. All these terms are fulfilled by the initiative amendment to the charter.

2. Some fault is found with the construction of the sewer whereby it is not fully efficient. In the absence of any allegation of fraud or criminality on the part of the officials representing the city, this is not a subject open to our inquiry. It is an exercise of municipal power referable to the legislative discretion of the city council with which we cannot interfere. The plaintiffs cite authorities like *Van Sant v. Portland*, 6 Or. 399, *Wilson v. Salem*, 24 Or. 504 (34 Pac. 9, 691), *Smith v. Portland*, 25 Or. 302 (35 Pac. 665), *Strout v. Portland*, 26 Or. 299 (38 Pac. 126), and similar precedents, to establish the contention that in making public improvements which lead to an enforcement of a tax on adjacent property the charter provisions must be strictly construed. These would be applicable if an attack had been made directly upon an assessment based immediately upon the original proceeding or upon the first assessment occurring thereafter. It must be remem-

bered, however, that this is an independent proceeding begun anew under the initiative Section 132a, and has no further dependence upon the former transactions than what is found in the actual fact that the improvement really has been accomplished. The case is not like *Murray v. La Grande*, 76 Or. 598 (149 Pac. 1019). There the charter provided that the council should give notice to the property holder of its intention to levy the assessment and of a description of the improvement proposed, together with the boundaries of the district to be affected and the estimated cost of the project designating the time when the freeholder might be heard on all these matters. The charter treated entirely of prospective improvements, giving the land owner an opportunity to contest not only the kind, but also the cost and the feasibility of the proposed betterment. The Medford Charter under consideration is not limited to prospective undertakings, but gives the council power to act on past improvements actually accomplished. Here, according to the city's fundamental law, the council has perpetual power to pursue the adjacent property until it succeeds in framing a regular proceeding complying with the initiative charter to compel payment of the actual expense incurred by the city for the undertaking already completed.

3, 4. The decree of the court pleaded as an estoppel affects only the assessment there involved. It cannot prevent any future levy regularly devised under the charter as amended. On the basis that the initiative charter amendment was a lawful exercise of the power conferred upon the voters of every city and town to amend their charters under Article XI, Section 2, of the Constitution, the proceedings of the council under the last assessment, being the one here in question, appear to be regular. To the extent that the legislative

charter is inconsistent with the change wrought by the legal voters in that instrument, the latter expression of the legislative power vested in them must prevail.

The decree of the Circuit Court is reversed and the bill dismissed. REVERSED.

MR. CHIEF JUSTICE MOORE, MR. JUSTICE MCBRIDE and MR. JUSTICE BENSON concur.

Denied July 11, 1916.

ON PETITION FOR REHEARING.

(158 Pac. 666.)

On petition of respondents for rehearing.

DENIED.

Mr. W. E. Phipps, for the petition.

Mr. B. R. McCabe, *contra*.

Department 1. MR. JUSTICE BURNETT delivered the opinion of the court.

5. A very earnest petition for a rehearing of this case has been presented on behalf of the plaintiffs and has had our careful attention. As a foreword, we notice this statement of the petitioner:

“The applicant for a rehearing occupies a somewhat embarrassing position. If his supplication is subservient, sycophantic, and flattering, his sincerity and honesty of purpose may be questioned; while if he utters his actual sentiment and opinion of the decision, he is apt to alienate the affection of the court.”

The duty of an attorney to his client requires utter fearlessness of purpose and a high order of talent. The function of the court which counsel is called upon

to advise is to declare the law without reference to flattery, invective or affection. The ascertainment of the legislative will as limited by the Constitutions of the state and of the United States is the sole object of judicial quest. The true lawyer will present his view to the court without sycophancy on the one hand or scurrility on the other. He will courageously declare his views of the true rule to be observed, with his reasons therefor, irrespective of the adverse ruling of the court. His duty to both court and client will admit of nothing less. His character as a gentleman and the dignity of his profession will permit of nothing more. Any court worthy of the name will respect such conduct although it may not concur with the argument.

6. The essence of the contention advanced as ground for rehearing is that because the city council did not observe the mandate of the legislative charter of Medford requiring 10 days previous notice before beginning the construction of a sewer, the laying down of such a drain cannot be made the basis of any future taxation of the property of the plaintiffs; and hence that, although the legal voters of Medford had amended their charter in the particulars noted in the former opinion, such legislation was *ex post facto*, and could not be made to apply to the improvement in question, which had been established for about three years before the present effort to tax for it had been inaugurated. That this argument is fallacious is settled by *Phillip Wagner v. Leser*, 239 U. S. 207, 216 (60 L. Ed. 230, 36 Sup. Ct. Rep. 66, 68), where the court says:

“It is first contended that the complainant is deprived of its property without due process of law, because the special assessment levied upon its property is for the special benefits long since accrued, and that the statute under consideration is retrospective in its

operation, thereby disturbing rights which had accrued to and become fixed in the property holders long before the passage of the statute; that the state had no authority, because of benefits thus long since conferred, to make the assessment in question. But we deem this contention foreclosed by the decision of this court in *Seattle v. Kelleher*, 195 U. S. 351 (49 L. Ed. 232, 25 Sup. St. Rep. 44). In that case it was contended that there could be no valid assessment for a certain improvement, because it was levied after the work was completed; but this court met that contention by saying: 'The principles of taxation are not those of contract. A special assessment may be levied upon an executed consideration; that is to say, for a public work already done (citing authorities). If this were not so, it might be hard to justify reassessments (citing additional precedents). Of course, it does not matter that this is called a reassessment. A reassessment may be a new assessment. Whatever the legislature could authorize if it were ordering an assessment for the first time, it equally could authorize notwithstanding a previous invalid attempt to assess. The previous attempt left the city free 'to take such steps as were within its power to take, either under existing statutes, or under any authority that might thereafter be conferred upon it, to make a new assessment upon the plaintiff's abutting property' in any constitutional way: *Norwood v. Baker*, 172 U. S. 269, 293 (43 L. Ed. 443, 19 Sup. Ct. Rep. 187); *McNamee v. Tacoma*, 24 Wash. 591 (64 Pac. 791); *Annie Wright Seminary v. Tacoma*, 23 Wash. 109 (62 Pac. 444).'

7. This ruling by the highest court of the land demonstrates that the amendment of the city charter in question is a valid exercise of municipal power, and that it is permissible to provide for local taxation to reimburse the municipality for expenses already incurred in making improvements of the kind mentioned. The change was so designed as to include the whole

subject matter contained in the section of the legislative charter upon which the plaintiffs rely in respect to the acquirement of jurisdiction to tax. Hence the earlier enactment must yield to the later one, where they conflict: *Strickland v. Geide*, 31 Or. 373 (49 Pac. 982). The initiative power conferred upon the legal voters of cities and towns by Article IV, Section 1a, and Article XI, Section 2, of the state Constitution sanctions the adoption of the amendment known as Section 132a of the Medford Charter.

8, 9. This new provision is very sweeping in its terms. It substantially provides that, no matter what the defect in the former proceeding, whether it be jurisdictional or otherwise, and no matter whether it shall have been declared void by judicial decision or if the common council shall be of the opinion that the assessment is illegal or doubtful for any reason, it may commence anew and proceed as stated in the revised charter. It cannot be contended that, as a preliminary to a valid assessment under this amended charter, the council must make a fictitious impost or attempt to act without jurisdiction. To urge this would be to say that a void act is the essential foundation for a valid one. The law does not require a vain thing, and hence considering the whole scope of the amendment, we hold that at any time after the improvement is laid down the city council, upon giving to the property holders to be affected the required notice and an opportunity to be heard, may proceed to assess and levy taxes to reimburse the municipality for the expense of the already installed improvement. Counsel for petitioners has divined this result. He says:

“While industrious citizens are busy at their ordinary vocations, special elections may be called for the purpose of voting charter amendments such as 132a.

In a city containing more than 10,000 people, only 310 persons may vote upon such an amendment, 175 for and 135 against the measure, adopting it by 40 votes."

Such consequences may be appalling to the taxpayer, but they present no judicial question. The initiative and referendum system has let loose upon the state such agencies and such results. We are subject to a system of government by popular election. If industrious citizens would protect themselves, they must make attendance at the ballot-box part of their ordinary vocations, and so continue until the people in their wisdom shall devise a more conservative system of government. Until that period shall arrive, the courts can only declare the law as it is, leaving the change to be wrought by the people themselves, the original source of all constitutions and laws.

We are urged to take up the question of the actual benefits to be derived or not by the property of the plaintiffs from the construction of the sewer in question. As an authority for so doing, we are cited to the case of *Myles Salt Co. v. Board of Commrs.*, 239 U. S. 478 (60 L. Ed. 392, 36 Sup. Ct. Rep. 204). That was a suit to restrain the sale of plaintiff's land for a tax levied by the defendant drainage district. It seems that the property of the plaintiff consisted of an island surrounded on two sides by bayous, on the rear by a salt-water marsh, and on the front by a bay. The island rose abruptly 175 feet or more above the surrounding marshy lands which were to be drained. The problem upon the island was to prevent washing and erosion, and the allegations were to the effect that the district had been made arbitrarily to include this elevation so as to levy taxes upon it for a scheme that would not, in any way, benefit the property, but would impose

a burden upon it for the benefit of the land of others, and that this was done without any just reason. Summing up the complaint, it is thus characterized in the opinion of the court:

“The charge is that plaintiff’s property was included in the district, not in the exercise of ‘legal legislative discretion,’ not that the scheme of drainage would inure to the benefit of the property, even indirectly, but with the predetermined ‘purpose of deriving revenues to the end of granting a special benefit to the other lands subject to be improved by drainage, without any benefit’ to plaintiff ‘or its property whatever,’ present or prospective.”

10, 11. The case was before the court on a general demurrer to the complaint. Nothing appeared in the pleading to indicate, as here appears, either that the question of benefit to or taxability of the property of plaintiff had been heard or determined by any lawfully established tribunal, or that an opportunity had been given for that purpose. On the demurrer the allegations necessarily were taken to be true as alleged. If nothing else appeared, the demurrer was properly sustained. But the present case is widely different. Written large on the amendment is the provision that notice shall be given, a time fixed for considering protests, and that the council shall hear and determine all objections to the proposed tax. It is a proper exercise of legislative power to commit this hearing and determination to the municipal council. Its decision must be respected in a collateral attack upon it, in the absence of any allegation of fraud in the procedure. This is in accordance with our previous decisions. It is not out of harmony with the doctrine of the *Myles Salt Co. Case* (*Myles Salt Co. v. Board of Commrs.*), 239 U. S. 478 (60 L. Ed. 392, 36 Sup. Ct. Rep. 204).

It comports with the rule laid down in the syllabus of *French v. Barber Asphalt Paving Co.*, 181 U. S. 324 (45 L. Ed. 879, 21 Sup. Ct. Rep. 625):

“It was not the intention of the Fourteenth Amendment to subvert the systems of the states pertaining to general and special taxation. That amendment legitimately operates to extend to the citizens and residents of the states the same protection against arbitrary state legislation, affecting life, liberty, and property as is afforded by the Fifth Amendment against similar legislation by Congress, and the federal courts ought not to interfere when what is complained of is the enforcement of the settled laws of the state, applicable to all persons in like circumstances and conditions, but only when there is some abuse of law, amounting to confiscation of property, or deprivation of personal rights.”

Hughes v. Portland, 53 Or. 370 (100 Pac. 942), cited by the plaintiffs, was a case of a writ of review directly attacking the proceeding itself. It was not a suit to enjoin the collection of a tax involving a collateral attack upon the assessment. The question at issue in *Terwilliger Land Co. v. Portland*, 62 Or. 101 (123 Pac. 57), was the matter of competition in obtaining bids from contractors. In that case the council had specified a particular kind of patented pavement of which a certain company had the monopoly, and it appeared that by the terms of the advertisement no other person could bid for the work. It was held that this was an incurable violation of the charter providing for competition in such work. No such question arises here. In *Dyer v. Bandon*, 68 Or. 406 (136 Pac. 652), the objection to the method of acquiring jurisdiction was that the notice did not specify the kind of improvement proposed, although this feature was required by the charter. No question is here raised about the terms of the

notice. The contention is that the power to give notice, and in pursuance thereof to assess the plaintiffs' property for an already established improvement, is utterly wanting. The fallacy of the position of the plaintiffs is that they rely upon the legislative charter and ignore the subsequent amendment made by the voters of the town. The sweeping provisions of the latter enactment enable the council to take up any previous improvement within the direct scope of municipal powers by a new and distinct proceeding, and after giving notice and an opportunity to be heard and determining objections thereto, to proceed to reimburse the city for previous expenses in that direction. The power is far-reaching, and may fall into the hands of irresponsible parties, and may be exercised in a manner abhorrent to conservative citizens, yet it exists; and, in the absence of any allegation of fraud on the part of those using the authority, we must respect their determination.

The petition for rehearing is denied.

REVERSED. REHEARING DENIED.

MR. CHIEF JUSTICE MOORE, MR. JUSTICE McBRIDE and MR. JUSTICE BENSON concur.

Submitted on brief April 26, affirmed July 11, 1916.

CASH v. GARRISON.*

(158 Pac. 521.)

Action—Nature and Form.

1. Where a complaint alleges the conversion of personalty, the breach of an agreement as to the manner in which business should be conducted, and misrepresentations as to the ownership of property involved all resulting in the destruction of plaintiff's business, the action is not in the nature of trover, but of action on the case.

Damages—Elements—Injury to Business.

2. In an action on the case in which plaintiff alleges the conversion of personalty, the breach of an agreement in regard to the manner in which business should be conducted, and misrepresentations as to the ownership of property, all tending to the wrecking of plaintiff's business for the benefits of defendants, plaintiff is entitled to recover, not only for the value of her interest in the physical property converted, but for the resultant injury to the business.

Appeal and Error—Disposition of Cause—Affirmance.

3. Under Article VII, Section 3, of the Constitution, as amended, authorizing the Supreme Court to affirm the judgment when it can be determined that it was such as should have been rendered, the judgment in an action for conversion of property and injury to plaintiff's business will be affirmed, notwithstanding technical errors, where the Supreme Court determines that the verdict was such as should have been rendered.

[As to what is conversion, see note in 15 Am. Dec. 151.]

From Multnomah: WILLIAM GALLOWAY, Judge.

In Banc. Statement by MR. JUSTICE McBRIDE.

This is an action by Emma Cash against E. B. Garrison and others, to recover damages alleged to have been sustained by plaintiff by reason of certain alleged wrongful and fraudulent acts of defendants. The complaint is too lengthy to be inserted here, but the substance of plaintiff's alleged cause of action may be

*For authorities on the question of loss of profits as element of damages for conversion, see note in 52 L. R. A. 51. And for cases passing upon the question of loss of profits on sale or purchase of business, as element of damages, see note in 52 L. R. A. 238.

briefly summarized as follows: At the times mentioned in the complaint defendants Joseph Mannix, E. B. Garrison and Bert Robison were doing business under the names of Portland Bottling Works, Shasta Water Company and Pioneer Soda Company. Defendants Robison and Lidell were doing business as partners under the name of Coca-Cola Bottling Works. On and prior to March 15, 1911, William H. Carter, Henry Maillard and Vance Gratton were partners engaged in the manufacture of soda water, Shasta water and other like substances, under the firm name of Carter-Maillard, and were conducting a profitable business and owned and controlled valuable assets consisting of machinery and supplies of the value of \$10,000. On March 15, 1911, plaintiff, with the consent of Gratton and Carter, purchased the one-third interest of Maillard, paying him therefor the sum of \$3,600, and became a partner in the business with Carter and Gratton. On October, 1911, defendants Garrison, Mannix and Robison conspired together for the purpose of cheating and defrauding plaintiff to get control of the business, property and assets of Carter-Maillard and Shasta Water Company, and to that end entered into negotiations with Carter, Gratton and plaintiff to purchase an interest in said property. Mannix with the knowledge and consent of Garrison and Robison, falsely represented that he was the owner of the property and assets of the Pioneer Soda Works, which he falsely represented had property and assets worth approximately \$10,000, and in pursuance of the fraudulent scheme agreed to sell the same to the Carter-Maillard company and to assume and pay all the debts of the Carter-Maillard company, provided they would sell to him an undivided one-fourth interest in said partnership.

There were further allegations to the effect that Mannix was not the owner of the Pioneer Soda Works and that Garrison and Robison had guilty knowledge of all his false representations and that the trade was closed upon the terms above mentioned. It was stipulated that the assets of the Pioneer Soda Works would be consolidated with the assets of the Shasta Water Company and Carter-Maillard, and that Mannix, acting in conjunction with Garrison and Robison, caused all the property of the Pioneer Soda Works to be brought over to the partnership of Carter-Maillard, and the business of the several companies was consolidated, which partnership did a large and profitable business and held valuable rights, franchises and licenses in the State of Oregon. In November, 1911, the defendants Robison, Mannix and Garrison, for the purpose of getting possession of the business of the consolidated companies and defrauding plaintiff, caused to be organized a corporation, known as the Portland Bottling Works, and, without the knowledge or consent of plaintiff and against her will, attempted to turn over, and did turn over, to said corporation all the property and assets of the consolidated companies. To abbreviate several pages of the complaint, it appears therefrom that Garrison, Mannix and Robison have broken their agreement to pay the debts of Carter-Maillard and the Shasta Water Company, have misapplied its receipts and disposed of its property, and so fraudulently managed its business that it has fallen from a highly profitable one to a worthless bankrupt concern, whereby plaintiff has been swindled out of the legitimate fruits of her investment. The matter in the complaint being put at issue, there was a jury trial and a verdict for plaintiff for the sum of \$1,250,

and, from a judgment upon such verdict, defendants appeal.

Submitted on briefs under the proviso of Supreme Court Rule 18: 56 Or. 622 (117 Pac. xi).

AFFIRMED.

For appellants there was a brief over the names of *Mr. Ralph E. Moody, Mr. George I. Brooks* and *Mr. A. Walter Wolf*.

For respondent there was a brief submitted by *Messrs Sheppard & Brock*.

MR. JUSTICE McBRIDE delivered the opinion of the court.

1, 2. The testimony in this case is very voluminous and the record complex. In the brief of appellants, it is assumed that this is the old common-law action of trover, but this assumption is erroneous. It is an action on the case as nearly as it can be assimilated to any of the common-law forms of action. It sets forth a long series of alleged wrongs and grievances, culminating in the fact that by reason of all these plaintiff has lost her investment and has been deprived of her property. So far as the conversion of the physical properties is concerned, it has the aspect of trover; so far as a breach of the agreement, in regard to the manner in which the business should be conducted, is involved, it has the aspect of an action *ex contractu*; so far as the misrepresentations as to the ownership of the property are concerned, it has the aspect of an action for deceit; but all the various acts and delinquencies tended to the same end, namely, to the wrecking and absorption of plaintiff's business for the benefit of defendants. It is an action on the case,

and, as such, if plaintiff was entitled to recover damages at all, she was entitled to recover not only for the value of her interest in the physical property converted, but for the resultant injury to the business.

“A series of wrongful acts, all aimed at a single result and contributing to the injury complained of, to wit, the destruction of one’s business, credit and reputation, may be counted upon collectively, as producing that result, in an action on the case”: *Oliver v. Perkins*, 92 Mich. 304 (52 N. W. 734).

3. In this view of the case, many of the objections to the instructions of the court disappear. Numerous objections were made to the rulings of the court in regard to the admission and rejection of testimony; in fact, the case seems to have been tried without much regard to the rules of evidence, and many technical errors in this respect appear in the transcript of testimony brought here. Considering the complicated state of the pleadings and the volume of testimony introduced, it is small wonder that errors were committed.

A perusal and consideration of the whole case satisfies us that the appellants engaged in a “get-rich-quick” scheme at plaintiff’s expense, and that the verdict was such as should have been rendered, and therefore, notwithstanding the technical errors appearing in the transcript, the judgment should be affirmed, as permitted by Article VII, Section 3, of our amended Constitution, and it is so ordered. AFFIRMED.

MR. JUSTICE EAKIN absent.

Argued June 23, reversed July 11, 1916.

JEFFREYS v. WEEKLY.*

(158 Pac. 522.)

Vendor and Purchaser—Misrepresentations of Quantity.

1. The introduction of the words "about" or "estimated" or "more or less" in a conveyance or contract for a conveyance does not afford a shield against liability for false representations as to acreage, and the mere fact that a deficiency is very large in proportion to the supposed quantity is often treated as in itself evidence of fraud or mutual mistake.

Vendor and Purchaser—Remedies of Purchaser—False Representations—Rescission.

2. Where the representations of a seller of land are false, are of material facts, and are relied upon by the buyer, it is immaterial, in the latter's suit for a rescission, whether the representations were knowingly false.

[As to liability of vendor for false representations innocently made, see note in *Ann. Cas.* 1913C, 63.]

Vendor and Purchaser—Remedies of Purchaser—Misrepresentation by Seller—Rescission.

3. Where the seller of a ranch, who had lived thereon for 40 years, represented that it had about 60 acres of good bottom land, whereas in fact there were only about 40, while the bottom land was so placed that it was difficult to estimate its quantity on inspection, the buyer was entitled to rescind.

Vendor and Purchaser—Remedies of Purchaser—Rescission—Retention of Possession.

4. In a suit by a purchaser for rescission of contract of sale, the fact that the purchaser remained in possession of the property after tender to the vendor by way of rescission is matter merely addressed to the court in adjusting the rights of the parties in relation to rents, improvements, interest or the like, and such retention of possession does not necessarily defeat the claim of rescission.

From Coos: JOHN S. COKE, Judge.

Department 2. Statement by MR. JUSTICE BEAN.

This is a suit in equity by John S. Jeffreys against I. T. Weekly and Q. V. Weekly for the rescission of an executory contract for the purchase by plaintiff of

*As to right of purchaser to rely on vendor's representation as to quantity of land sold, see note in 37 L. R. A. 610. REPORTER.

a ranch in Coos County, Oregon. The Circuit Court found in favor of the defendants, and rendered a decree accordingly. Plaintiff appeals. The purchase price was \$10,500. Plaintiff paid \$3,500 at the time of the execution of the contract on January 8, 1914, and went into possession of the farm in February of that year. The gist of the plaintiff's complaint is that at the time of making the agreement, as an inducement to the plaintiff to purchase the land, defendants made the following representations to the effect: (1) That the described premises contained 60 acres of bottom land, 58 of which were improved and 2 of which were covered by a hard maple growth; (2) that the water system on the lands was supplied from a live spring, and afforded sufficient water the year around for all domestic purposes and for the watering of the livestock on the ranch; (3) that the defendants were selling to plaintiff a merchantable title to the premises, except as to the lands theretofore conveyed to the school district. These representations were alleged by the plaintiff to be false. He averred that there were not to exceed 34 acres of bottom land, nor more than 32 of it improved; that he came to Coos County only a few weeks before the making of the contract, having resided for about 35 years in the eastern part of Washington on an open, rolling prairie; that he was unacquainted with the topography of lands similar to those purchased, and therefore, upon viewing the land, was unable accurately to estimate its acreage, or to compute its area on account of his inability to read or write; that he first became suspicious that the representations of the acreage were false in the spring of 1914, when he obtained the assistance of a neighbor, and roughly ascertained that there was a material shortage; that in July, 1914, he employed a civil en-

gineer and caused the land to be surveyed; that the bottom lands are reasonably worth \$125 an acre; that the water system does not afford sufficient water for either domestic purposes or for the watering of the livestock upon the premises, which he discovered during the summer season of 1914; that about May 11, 1907, the defendants had sold to O. C. Rice all the merchantable timber from the tract, except the maple wood of the bottom land, and had given the purchaser 15 years from the date of the deed to remove the same; that the first intimation he had of the Rice transfer was when a logger came there about May 1st to see about cutting the timber, and the first certain knowledge of it came to him through his attorneys, whom he consulted in July, 1914; that at the time of making the contract he relied upon the representations of the defendants; that the exception of the Rice deed was mentioned in the written agreement, but was not understood by him; that the ranch was worth several thousands of dollars less than it would have been if the representations had been true; that on August 19, 1914, soon after the discovery of the falsity of the representations, he rescinded the contract, delivered to the defendants notice of rescission, and tendered the property to them, which they refused. Defendants deny the making of any false representations, and aver that I. T. Weekly, defendant, told the plaintiff that the lands had never been surveyed, except a parcel of 7 acres; that he also told him that there were about 58 acres of bottom land, 2 acres of which were covered by a hard wood growth; that he did not guarantee, warrant nor misrepresent the number of acres of bottom land, and that the same was given only as a matter of opinion by him; that plaintiff examined the premises before making the contract, and had an

opportunity to estimate the area of the different kinds of land; that defendants never knew the exact amount of bottom land or plow land on the ranch; that plaintiff was informed that the water in the spring went low in dry seasons, and also of the sale of the timber to O. C. Rice. Defendants further averred that, after obtaining full knowledge of the condition of the land, plaintiff treated the property as his own, and was thereby estopped from claiming the relief prayed for in his complaint.

The reply puts in issue the new matter of the complaint, and alleges that after the discovery of the fraud plaintiff exercised dominion over the premises only for the purpose of preserving the same.

REVERSED. DECREE RENDERED.

For appellant there was a brief over the name of *Messrs. Peck & Peck*, with an oral argument by *Mr. Cassius R. Peck*.

For respondents there was a brief over the names of *Mr. Lawrence Liljeqvist* and *Mr. A. J. Sherwood*, with an oral argument by *Mr. Liljeqvist*.

MR. JUSTICE BEAN delivered the opinion of the court.

It appears from the evidence that a short time before the making of the contract plaintiff was introduced to defendant I. T. Weekly, and among the first questions which he asked in making the negotiations for the purchase of the farm was how many acres of bottom land there were. The only dispute in regard to the answer given by Weekly is whether or not he said there were 60 acres, 2 of which were maple grove and 58 susceptible of plowing, or whether he said there were "about" that many. The estimate of the value

of the bottom land, which appears to be the most valuable part of the farm, varies from \$125 to \$250 an acre. The remainder, except about 2 or 3 acres of bench land upon which the buildings are situated, is estimated to be worth about \$15 or \$20 an acre. A fair valuation of the bottom land would seem to be \$150 an acre. Plaintiff employed a Mr. Gettings, a civil engineer, to measure the bottom lands. According to his survey there were 37.38 acres thereof, 31.69 of which were in cultivation. Defendants engaged Mr. Gould, the county surveyor, to make a measurement, which showed 40 acres of bottom land, 36 acres of which could be cultivated and 32 that had been improved.

1. There is considerable evidence in the record as to the exact language that was used by Weekly. Plaintiff, who signs his name with a cross, was informed that he could rely upon the information given him by defendant Weekly, and it appears that he did so. As shown by the two surveys, there is but little difference in the area of the bottom land, which is accounted for principally by a variation as to what was considered bottom land in making the same. In his measurement the county surveyor included the land between high and low water mark on the river. Whatever language defendant employed, the record shows that he intended to induce the plaintiff to believe that there were about 60 acres of valuable bottom land, 58 of which could be cultivated. The introduction of the words "about" or "estimated" or "more or less" in a conveyance or a contract for a conveyance does not afford a shield against liability for false representations, and the mere fact that a deficiency is very large in proportion to the supposed quantity is often treated as in itself evidence of fraud or mutual

mistake: *Boddy v. Henry*, 126 Iowa, 31 (101 N. W. 447, 452); *Brawley v. United States*, 96 U. S. 172 (24 L. Ed. 622); *Belknap v. Sealey*, 14 N. Y. 155 (67 Am. Dec. 120); *Hosleton v. Dickinson*, 51 Iowa, 244 (1 N. W. 556); *Estes v. Odom*, 91 Ga. 600 (18 S. E. 356, 357); *Harrell v. Hill*, 19 Ark. 102 (68 Am. Dec. 208).

The main contention of the defendant, and, as we understand the record, the principal reason for the finding of the trial court, is that the defendant Weekly qualified his statement by saying that there were "about" 60 acres; and that this was not a false statement, but an expression of an opinion, and that plaintiff was given an opportunity to inspect the land for himself. It appears that the defendant had resided upon the land for about 40 years, and had cleared and cultivated the bottom land, in regard to which there is the principal controversy; that the plaintiff visited the premises before making the bargain, and examined the bottom land, which is in an irregular shape, a portion of it being situated upon both sides of Elk Creek which is winding and flows into the East Fork of the Coquille River, and another part located upon the river somewhat at a right angle to the land on the creek. It is very difficult to estimate its area. He made two other visits before the contract was signed, but did not examine the land. The plaintiff desired the ranch for raising stock and dairying, and the area of the bottom land, which is good and tillable, was a material consideration in the negotiations and in framing the contract. There was a shortage of more than one third. It is clear that the plaintiff did not obtain what he purchased or that for which he contracted. As soon as he discovered this he demanded of defendant Weekly that he adjust the matter. The latter answered that there was "Nothing doing." The de-

fendant seemed to consider that if he did not make any positive false statement, plaintiff, Jeffreys, was legitimate prey. Whatever phraseology was employed by Weekly, Jeffreys was overreached and deceived in the transaction. Weekly states that there was not much said about the timber being sold. In the contract the exception is stated thus: "Subject to the provisions of that certain deed made by the first parties hereto to O. C. Rice, recorded May 14, 1907," and naming the record. It is clear that Jeffreys did not understand fully at the time of making the contract that the timber, estimated at about 3,000,000 feet, had been sold from the land. The water supply, which was piped from a spring, was short during the season of 1914. While these facts are not of as much magnitude as the deficiency in the acreage of the bottom land, they at least lend color to the transaction. If a merchant should sell to Mr. Weekly a can of coffee supposed to contain 60 pounds, and there should be only 40 pounds, he would not consider it a fair deal. If, in settling a transaction, plaintiff had, by mistake, paid Weekly \$60 when it was intended and agreed that \$40 was due, the difference could unquestionably be recovered.

2, 3. If the representations of defendant were false, were of material facts, and relied upon by plaintiff, in this suit for a rescission, it is immaterial whether the representations were knowingly false or otherwise: *Vaughn v. Smith*, 34 Or. 56, 57 (55 Pac. 99); *Cawston v. Sturgis*, 29 Or. 331 (43 Pac. 656); *Bonelli v. Burton*, 61 Or. 435 (123 Pac. 37); *Joplin v. Nunnelly*, 67 Or. 574 (134 Pac. 1177); *McCrea v. Hinkson*, 65 Or. 137 (131 Pac. 1025); *Spence v. Hull*, 75 Or. 274 (146 Pac. 95). In 39 Cyc. 1267, it is stated:

“Fraud or misrepresentation as to the quantity of the land contracted for relates to a material fact and avoids the contract, unless the statement is a mere expression of opinion, or the circumstances are such that the purchaser has no right to rely on the statement. In such cases it is immaterial whether the sale was by the unit of area, such as the acre, or was in gross.”

In *Van de Wiele v. Garbade*, 60 Or. 593 (120 Pac. 752), this court indicated that, if the assertion is of a present condition capable of being proved or disproved, it is a statement of fact and not of an opinion. In *Shute v. Johnson*, 25 Or. 61 (34 Pac. 966), this court said:

“But if the representations were intended to be the statement of a fact, to be understood and relied upon as such, relief will be granted.”

In *Smith v. Anderson*, 74 Or. 94 (144 Pac. 1159), this language was used:

“However, it is not always easy to decide whether a given statement is one of opinion or of fact. To be considered in deciding the question is the subject matter, the respective knowledge of the parties, and the form of the statement.”

In *Boelk v. Nolan*, 56 Or. 237 (107 Pac. 691), we find:

“A matter of opinion may amount to an affirmation of fact, when the parties are not dealing upon equal terms, and one of them has, or is presumed to have, means of information not equally open to the other.”

In the present case the vendor had resided upon the land for about 40 years. He had cleared the bottom land and cultivated it, and would certainly be presumed to be familiar with its area; while the plaintiff, a stranger in that part of the state, had seen the land

during one day. In *Koehler v. Dennison*, 72 Or. 373 (143 Pac. 653), it is enunciated thus:

“The rule that no one is liable for an expression of an opinion is applicable only when the opinion stands by itself as a distinct thing.”

In *Cawston v. Sturgis*, 29 Or. 331 (43 Pac. 656), the syllabus tersely shows the opinion upon this point as follows:

“Misrepresentations of material matters recklessly made as of one’s own knowledge, without in fact knowing whether they are true or not, render the maker liable to one who relies and acts thereon to his injury.”

In *Vaughn v. Smith*, 34 Or. 56, 57 (55 Pac. 99), it is said:

“The defendant’s representations with regard to the condition of the title to the premises being false in fact, though made, as the court finds, ‘unthoughtedly,’ and being relied and acted upon by plaintiff, constituted such constructive fraud as will authorize a court of equity to treat the deed as an executory contract to convey and rescind the same.”

Spence v. Hull, 75 Or. 274 (146 Pac. 95), was a case where this court found the facts much the same in substance as in the case at bar. But plaintiff in that case contracted to exchange a house and lot for certain crops and personal property. He was led to believe, as an inducement to make the contract, that there were 100 acres of crops. He visited the farm. The crops were in irregularly shaped fields, which could not be estimated accurately or measured easily. There were in fact less than 70 acres of crops. On this account plaintiff was held to be entitled to rescind the contract. *McCrea v. Hinkson*, 65 Or. 137 (131 Pac. 1025), supports the proposition that an innocent and mutual mistake alone is sufficient to justify rescission of a

contract for the sale of land when the mistake is shown to be material, when if the truth had been known to the parties the agreement would not have been made. In *Joplin v. Nunnelly*, 67 Or. 574 (134 Pac. 1177), it was announced by Mr. Justice RAMSEY that when a person makes a representation of fact to another which he knows not to be true, or when the circumstances are such that the law imputes to him knowledge of their untruthfulness, and the person to whom the representations were made believes them to be true and acts on them to his injury, the person making the representations is guilty of fraud. An action for the rescission of a contract, according to the "great weight of authority, can be maintained regardless of whether the false representation amounts to a fraud or is an innocent misrepresentation": 1 Elliott on Contracts, § 88, p. 151.

The contract in question in the case at bar is executory. It is not such an agreement as, under the circumstances, should be enforced by a court of equity. The difference between the real area and that supposed by the purchaser is so great that it would be unconscionable to uphold the contract; and the plaintiff was entitled to rescind.

4. It is contended by defendants that the plaintiff is not entitled to rescind for the reason that he remained in the possession of the premises and cultivated the same after he discovered the alleged fraud. In May or June, 1914, he complained to Weekly, and endeavored to have him correct the matter, and in August of that year he made a formal tender to Weekly of the property. He cared for and harvested the crops afterward. The correct rule in regard to such a state of affairs is stated in 1 Bigelow on Fraud, page 435, as follows:

“In suits by purchasers for rescission of contracts of sale the fact that the purchaser has remained in possession of the property after tender to the vendor by way of rescission, as well as before, is a matter merely addressed to the court in adjusting the rights of the parties in relation to rents, improvements, interest or the like.”

Such retention of possession by the purchaser does not necessarily defeat the claim of rescission. The parties should be placed as nearly as possible in their former condition: *McGowan v. Willamette Valley Irr. L. Co.*, 79 Or. 454 (155 Pac. 705).

The plaintiff, after he had tendered to defendants a conveyance of the real estate and the personal property purchased, in the usual conduct of the ranch sold two cattle and three sheep for \$111.45, which amount should be deducted from that to be refunded. The decree of the lower court should be reversed, and one entered rescinding the contract of January 8, 1914, and canceling all the obligations of plaintiff thereunder. Plaintiff is entitled to a judgment against the defendants for the sum of \$3,500, less \$111.45. The plaintiff has had the use of the farm for one season, and has made some improvements thereon. The rental should be offset against the interest upon the amount paid for about two years; and it is so ordered.

REVERSED. DECREE RENDERED.

MR. CHIEF JUSTICE MOORE, MR. JUSTICE HARRIS and MR. JUSTICE BENSON concur.

Submitted on brief June 23, reversed and dismissed July 11, 1916.

HERSCHBACK v. HERSCHBACH.*

(158 Pac. 526.)

Divorce—Grounds—Willful Desertion—Statute.

1. Under Section 507, L. O. L., a dissolution of the marriage contract may be decreed in Oregon at the suit of the injured party for willful desertion for one year.

Divorce—Grounds—Desertion—Living Apart by Consent.

2. Where a wife, upon her marriage, with the consent of her husband, went to the home of her relatives to live until her husband could secure sufficient means to enable them to commence house-keeping, she could not be charged with deserting her husband until he had canceled his consent that she live with her relatives.

[As to desertion as ground for divorce, see note in 119 Am. St. Rep. 617.]

From Marion: **WILLIAM GALLOWAY, Judge.**

In Banc. Statement by **MR. CHIEF JUSTICE MOORE.**

This suit was commenced April 3, 1915, by Sigmund H. Herschback against Magdalena Herschback for a divorce on the ground of desertion, alleged to have occurred July 13, 1913, the complaint being in the usual form.

The answer denies the abandonment, and avers that shortly after the marriage of the parties the plaintiff willfully and without cause deserted the defendant, and against her will and consent has continued to live separate and apart from her. No affirmative relief, however, is sought by her. The material allegations of new matter in the answer having been denied in the reply, the cause was tried, resulting in a decree of divorce in favor of the plaintiff, but requiring him to contribute the sum of \$5 a month toward the support of their daughter, who is two years old, and the defendant appeals.

*As to effect of consent to separation between husband and wife, on the question of desertion by spouse leaving, see note in 39 L. R. A. (N. S.) 1121. **REPORTER.**

Submitted on briefs under the proviso of Supreme Court Rule 18: 56 Or. 622 (117 Pac. xi).

REVERSED AND DISMISSED.

For appellant there was a brief submitted by *Messrs. Smith & Shields*.

For respondent there was a brief prepared and presented by *Mr. Robin D. Day*.

For the State there was a brief filed by *Mr. Ernest R. Ringo*, District Attorney.

Opinion by MR. CHIEF JUSTICE MOORE.

The testimony shows that these parties were married at Chester, Illinois, March 15, 1912, when each was quite young. The plaintiff was then employed by a farmer and the defendant was doing housework for a neighbor. Like many persons of their age, they had no money or property, and at the marriage they agreed she should reside with her parents until he could secure sufficient means to enable them to commence housekeeping. He visited his wife several times, but never lived with her; such association being deferred, by consent, until he could support her. After their child was born, the plaintiff ceased calling upon his wife and neglected to make any provision for her sustenance, whereupon she, invoking the remedy given by a statute of Illinois, commenced in the Circuit Court of Randolph County, in that state, a suit against him for support and maintenance, and at the March, 1913, term thereof secured a decree requiring him to pay her \$10 on the 15th of that and each succeeding month. He made three payments as required, but on July 12, 1913, left Illinois, and came to Oregon, and in his com-

plaint for a divorce alleges his wife deserted him on that day.

As a witness in his own behalf he testified that he wrote to her from Salem, Oregon, addressing the letter to Minnith, Missouri, her then residence, asking her to come to him, but that he received no reply to his request. It does not appear that he sent her any money with which to make the journey, or that he was then able, ready or willing to support her, or that she was able to come to him. On cross-examination, in referring to the time when such letter was written, he said it was some time in December, 1914.

“Q. That is the letter you referred to while Mr. Day [the plaintiff’s counsel] was examining you?

“A. Yes, sir.”

The deposition of the defendant is to the effect that she never received any communication from the plaintiff since he left. Upon this subject she stated upon oath:

“He never requested me to accompany him when he left the State of Illinois, and did not inform me that he was going, or intended to go, and he never did request me to live with him since he left the State of Illinois, and I have had no word or letter from him since he left Illinois. I did not know where he had gone after leaving Illinois, or where he had located, until I received notice through the postoffice of the bringing of this suit for divorce in the Circuit Court of Marion County, in the State of Oregon.”

1, 2. A dissolution of the marriage contract may be decreed in Oregon at the suit of the injured party for willful desertion for one year: L. O. L., § 507. “Desertion or abandonment,” say the court in *Luper v. Luper*, 61 Or. 418, 423 (96 Pac. 1099, 1101), “consists in the voluntary separation of one spouse from the

other for the prescribed time, without the latter's consent, without justification, and with the intention of not returning." The defendant, with the plaintiff's consent, having gone to the home of her relatives to live until her husband could secure sufficient means to enable them to commence housekeeping, she could not be charged with deserting him until he had canceled such consent. This does not appear to have been done July 12, 1913, when he left Illinois for Oregon. If his testimony is to be regarded as true, no abandonment occurred until December, 1914, and, this suit having been commenced April 3, 1915, no cause therefor then existed.

The testimony conclusively shows that this suit was commenced before the expiration of one year from the desertion, as claimed by the plaintiff. This being so, the decree should be reversed and the suit dismissed, and it is so ordered. **REVERSED AND DISMISSED.**

Argued June 23, peremptory writ ordered July 11, 1916.

PORTLAND GAS & COKE CO. v. CAMPBELL.

(158 Pac. 527.)

Appeal and Error—Appeal from Order Granting New Trial—Certification of Testimony.

1. Upon appeal from an order granting new trial, the Supreme Court must have the record of the former hearing before it to determine whether or not there was any error therein which would justify the order vacating the judgment, and under Article VII, Section 3 of the Constitution, appellant has the right to have the whole testimony attached to the bill of exceptions.

Original proceeding in Supreme Court.

In Banc. Statement by MR. JUSTICE BENSON.

This is an original proceeding in *mandamus* by the Portland Gas & Coke Company against James U. Campbell.

The cause was presented upon demurrer to an alternative writ of *mandamus* issued out of the court upon the following facts. The plaintiff herein was defendant in an action for damages in the lower court wherein it obtained a verdict and judgment in its favor. Thereafter, upon motion of plaintiff in such action, the court entered an order setting aside the judgment and granting a new trial. From this order, plaintiff appealed and presented to the judge of the lower court a bill of exceptions to which was attached all the evidence and exhibits admitted upon the trial of the action, which the judge refused to certify, and refused further to certify any bill of exceptions which should include the evidence.

PEREMPTORY WRIT ORDERED.

For plaintiff there was a brief over the names of *Mr. F. C. Howell, Messrs. Wilbur & Spencer* and *Messrs. Stapleton & Conley*, with an oral argument by *Mr. F. C. Howell*.

For defendant there was a brief with oral arguments by *Mr. Levy Stipp* and *Mr. Christian Schuebel*.

MR. JUSTICE BENSON delivered the opinion of the court.

1. The defendant insists that, since the order appealed from is a matter of record, no bill of exceptions is necessary, and that therefore the plaintiff is not entitled to have the testimony of the trial certified. However, upon appeal from an order granting a new trial, this court must have the record of the former

hearing before it, to determine whether or not there was any error therein which would justify the order vacating the judgment. Article VII, Section 3, of our state Constitution, gives every litigant the unqualified right to have the whole testimony attached to a bill of exceptions upon appeal. The demurrer is overruled and a peremptory writ ordered.

PEREMPTORY WRIT ORDERED.

MR. JUSTICE EAKIN absent.

Argued June 22, affirmed July 11, 1916.

ARMSTRONG v. PINCUS.*

(158 Pac. 662.)

Appeal and Error—Review—Findings.

1. On appeal from a judgment at law, tried without a jury, the Supreme Court must determine whether there was any competent evidence to support the findings.

Navigable Waters—Waters and Watercourses—Land Below High-water Mark—Nature of.

2. Land below the high-water mark of a river or stream is part of the bed of the stream or river.

Boundaries—Surveys—Meander Lines.

3. The stream or other body of water, and not the meander line as actually run on the ground to measure a fractional section abutting on such stream, is the boundary line of the land.

Navigable Waters—Deeds—Construction.

4. Plaintiff's intestate sold land abutting on a stream, under an agreement providing that if, upon survey, there should be less than 271 acres, the purchase price should be rebated. Upon resurvey it was found that since the land had been patented from the government the land had eroded, so that the present ordinary high-water mark was within the meander lines run by the government surveyor. *Held*, that as the bank of the stream, and not the meander line, formed the boundary, land which lay below the ordinary high-water mark was properly excluded on resurvey, for the loss by erosion, just as any gain by accretion, falls on the owner in possession.

[As to navigable streams as boundaries, see note in 27 AM. St. Rep. 56.]

*As to effect of bounding grant on river or tide water, see comprehensive note in 42 L. R. A. 502. REPORTER.

Navigable Waters—Waters and Watercourses—Accretion—Right to.

5. Where land abuts on a stream, the owner is entitled to any accretions formed.

From Multnomah: GEORGE N. DAVIS, Judge.

Department 2. Statement by MR. JUSTICE BEAN.

This is an action by George M. Armstrong, administrator of the estate of George Armstrong, deceased, against Julius Pincus, to recover a balance due for land sold to the latter by the plaintiff under a written contract.

The contract of sale was executed in writing on December 30, 1913. The land in question was described in the contract as follows:

“The donation land claim of Abner Fickle and Susannah Fickle, his wife, being Lot No. 5149, and described as lot 4 of section 11, lots 3, 4, 6 and 8, and the southwest one-quarter ($\frac{1}{4}$) of the northwest one-quarter ($\frac{1}{4}$) of section fourteen (14), the south one-half ($\frac{1}{2}$) of the northeast one-quarter ($\frac{1}{4}$), the northwest one-quarter ($\frac{1}{4}$) of the southeast one-quarter ($\frac{1}{4}$), and lot nine (9) of section fifteen (15), in township ten (10) south, range four (4) west of the Willamette meridian, Oregon, containing 321.87 acres, excepting therefrom the following tract, to wit: [Here follows a description by metes and bounds] containing 50 acres, leaving 271.87 acres.”

It was stated in paragraph V of the agreement that:

“Should, upon a survey of said property, there be less than 271.87 acres, then in that event the purchase price herein stated shall be rebated *pro tanto*.”

The purchase price was \$13,589, or practically \$50 an acre. Upon a survey made there appeared to be 247.108 acres, for which, according to the terms of the contract, the defendant paid plaintiff. He now contends that there were 262.731 acres, and sues for the difference at \$50 an acre, amounting to \$781.15.

The easterly boundary of the tract of land contracted to be sold has always been the Willamette River. This stream has gradually encroached upon the land until the ordinary high-water mark is now considerably farther west than formerly, and accordingly, upon a survey of the property, the acreage had decreased. It appears that the surveyor followed the original government survey, with the exception of the easterly boundary thereof, which borders on the Willamette River, from which survey he departed, and drew his measurement along the present line of ordinary high water. The defendant paid the plaintiff for the amount of land as surveyed. **AFFIRMED.**

For appellant there was a brief over the name of *Messrs. Seitz & Clark*, with an oral argument by *Mr. Maurice W. Seitz*.

For respondent there was a brief over the name of *Messrs. Bronaugh & Bronaugh*, with an oral argument by *Mr. Earl C. Bronaugh*.

MR. JUSTICE BEAN delivered the opinion of the court.

The plaintiff objects to this survey, claiming that the surveyor had no warrant nor authority to depart from the easterly boundary as established by the United States government. He claims that, had the surveyor followed the lines so established, the tract would have contained 262.731 acres. The only question, therefore, to be decided on this appeal, is this: In the resurvey of the tract of land in question, was the surveyor warranted in departing from the original survey to the extent of following the present line of ordinary high water of the river, or should he have

taken the original line established by the United States government as the easterly boundary of the property?

1-5. It is claimed by counsel for plaintiff that in the resurvey of land the surveyor is bound to observe certain statutory regulations and established customs, and must follow in the footsteps of the original surveyor as nearly as possible; that under no circumstances is he to depart therefrom—citing Section 2990, L. O. L., and *Trinwith v. Smith*, 42 Or. 239 (70 Pac. 816), and other cases. It is stipulated by the respective counsel for the parties:

“That said line is drawn on the west bank of said Willamette River at the ordinary high-water mark as it now exists, and that all lands between said present line of the ordinary high-water mark and the original line as established by the United States government is now covered by the river at ordinary high water.”

It is well settled that, on an appeal from a judgment in a law action tried without a jury, we are to determine whether there was any competent evidence to support the findings. The main question is: What is the meaning of that part of the agreement providing for a survey of the property, and that if there be less than a certain number of acres, then the purchase price stated shall be rebated? It is apparent from the contract that this provision was made for a survey of land, and not of the river, or of land submerged by water. It may be said that below ordinary high-water mark land is deprived of its usefulness as land by the action of the water remaining upon it so permanently, and becomes what we all know as the bed of the river: *Paine Lbr. Co. v. United States* (C. C.), 55 Fed. 854, 865; *Sun Dial Ranch v. May Land Co.*, 61 Or. 205 (119 Pac. 758). The beach or shore of our rivers is the actual as well as the nominal bed of the river: Hoch,

Rivers, § 7. All is river or river's bed which is contained between the two banks and the high-water line on them, and all is bank or land which embraces the waters in their ordinary full tide: Land in New Orleans, called the Batture, 17 Am. St. Papers, 91.

In surveying fractional portions of public lands bordering on navigable rivers, meander lines are run, not as boundaries of the tract, but for the purpose of determining the sinuosities of the banks of a stream, and as the means of ascertaining the quantity of the land in the fraction, subject to sale, which is to be paid for by the purchaser. In preparing the official plat from the field-notes, the meander line is represented as the border line of the stream, and shows to a demonstration that the watercourse, and not the meander line as actually run on the land, is the boundary: *Railroad Co. v. Schurmeier*, 7 Wall. 272 (19 L. Ed. 74); 14 Ballard's Law of Real Property, § 45. This rule has been expressly approved by this court in *Minto v. Delaney*, 7 Or. 337, 342. See, also, *Moore v. Willamette T. & L. Co.*, 7 Or. 356, 357. It has become a settled rule of law in this state that the stream or other body of water, and not the meander line as actually run on the ground, is the boundary of the riparian owner: *Weiss v. Oregon Iron & Steel Co.*, 13 Or. 496, 497 (11 Pac. 255); *Turner v. Parker*, 14 Or. 340, 341 (12 Pac. 495); *French Livestock Co. v. Springer*, 35 Or. 312, 317 (58 Pac. 102); *Cawlfild v. Smyth*, 69 Or. 41 (138 Pac. 227).

The case at bar involves a contract almost identical with that in question in *Sun Dial Ranch v. May Land Co.*, 61 Or. 205 (119 Pac. 758), where it was held that the point to which the water rises in ordinary seasons of high water forms the boundary of the title of the riparian owner; that is, that the stream, and not the actual meander line as run on the ground, is such

boundary. In that case it was agreed that in the ascertainment of the number of acres sold, for the purpose of fixing the amount of the consideration to be paid, the ordinary high-water mark on the Columbia River is the line of demarcation between the land which should be measured and the bed of the river. It is fair to assume that the parties in the present case contracted with that decision in view: See, also, *Parker v. Taylor*, 7 Or. 435, 445; *Johnson v. Knott*, 13 Or. 308 (10 Pac. 418).

Taking the stipulation as to the survey of the land, its description, and all the contents of the agreement of the parties bearing thereon, it is clear that the surveyor properly followed the exact survey of the United States government in every respect except the river line, and that he properly followed the river boundary of this land along the line of ordinary high water as it now exists, and that this was the agreement of the parties as shown by the contract. There was competent evidence to support the findings made by the trial court. Section 2990, L. O. L., and the cases cited in plaintiff's brief, relate to the establishing and relocating of lines which constitute the boundaries of legal subdivisions of public lands, and the re-establishing of government corners, and do not apply to meander lines which are not boundary lines. If plaintiff's position were correct, then, had there been an accretion, instead of an erosion, defendant could have claimed the benefit of the same under his contract, and the plaintiff could not have collected therefor, if the stipulation had been for the payment of so much an acre. It is well established that accretions always pass by a deed of the original upland owner, unless expressly reserved by the grantor. It does not appear to us that the parties contemplated that the plaintiff

was selling the defendant acres of land which had been carried away to the sea or which were submerged below ordinary high-water mark.

It is practically claimed by plaintiff that, because of the fact that it is possible that the property may be restored or will accrete and belong to the owner, he should collect for the acreage as embraced by the meander line. While it is true that accretion is the right of one owning the land on the border of a stream to the additions imperceptibly made to his land by the action of the water, yet such right would be that of the owner at the time the accretion is made, and not some former owner. The claim of plaintiff is tantamount to an assertion of a right to a gain in this respect after the date of sale, without a chance of loss by erosion. After the conveyance was made, these are matters which affected the grantee in that conveyance. It appears that, when the parties used the word "survey" in paragraph V, they did it advisedly and with a definite purpose. It is evident that the plaintiff intended to sell, and the defendant to buy, a definite quantity of land at \$50 an acre, that both parties knew that the river bank had changed its location, and that an actual survey would be necessary to ascertain the *quantum* of land.

Finding no error in the record, the judgment of the lower court is affirmed.

AFFIRMED.

MR. CHIEF JUSTICE MOORE, MR. JUSTICE HARRIS and MR. JUSTICE BENSON concur.

MR. JUSTICE EAKIN absent.

Argued June 22, reversed July 11, 1916.

TOWNSEND v. CHAMBERLAIN.

(158 Pac. 664.)

Attorney and Client—Attorney's Lien—Notice—Statute.

1. The right to an attorney's lien depends upon notice of a lien upon the judgment being served upon the judgment debtor and filed, under Section 1088, L. O. L.

Attorney and Client—Assertion of Lien—Order of Court.

2. Where defendant judgment creditor's attorney made a motion, supported by affidavits, asserting his claim of attorney's lien and that the settlement of the judgment by his client, the judgment creditor, was in fraud of his rights, the proceeding on the motion not being part of the suit to set aside the judgment as fraudulent, plaintiffs, the judgment debtors, not being served with notice and not appearing, while the parties in interest were different from those in the action in which the judgment was rendered, the order of the court canceling the satisfaction, the affidavits, stating no fact indicating that it was obtained fraudulently, or that the settlement was invalid as to the judgment debtors, and authorizing the collection of the remainder of the judgment by the attorney, was a nullity.

Attorney and Client—Attorney's Lien—Payment or Satisfaction of Judgment—Statute.

3. Under Section 1088, L. O. L., touching attorney's liens, where the judgment debtor in good faith pays or satisfies the judgment before notice of the lien of the judgment creditor's attorney, the latter cannot enforce the judgment as against him.

[As to lien of attorneys, see note in 51 Am. St. Rep. 251.]

Execution—Sale on Execution—Injunction.

4. A sale upon execution will be enjoined in equity when it would constitute a cloud on the title of realty.

From Marion: WILLIAM GALLOWAY, Judge.

Department 2. Statement by MR. JUSTICE BEAN.

This is a suit by Henry A. Townsend, Eunice Townsend and H. H. Vandevort against R. H. Chamberlain, Wm. Esch and Frank Holmes to restrain the enforcement of an execution issued on a judgment. From a decree in favor of defendants, plaintiffs appeal.

REVERSED.

For appellants there was a brief and an oral argument by *Mr. Walter C. Winslow*.

For respondents there was a brief and an oral argument by *Mr. Frank Holmes*.

MR. JUSTICE BEAN delivered the opinion of the court.

1. The following is shown by the record: On February 4, 1914, a judgment was duly rendered and entered in the Circuit Court of the State of Oregon for Marion County in favor of defendant R. H. Chamberlain and against plaintiffs Henry A. Townsend and Eunice Townsend, for the sum of \$289, with costs and disbursements at \$54.60. On appeal to this court the Townsends endeavored to have the judgment reversed, but the same was affirmed and entered against them and H. H. Vandevort, their surety on their undertaking on appeal: See *Chamberlain v. Townsend*, 72 Or. 207 (142 Pac. 782, 143 Pac. 924). They were also unsuccessful in a suit in the Circuit Court to set aside the judgment as having been fraudulently obtained upon perjured testimony. On October 3, 1914, the former controversy existing between plaintiffs herein and defendant R. H. Chamberlain was settled upon the payment of \$112.50 by the Townsends to the latter without the knowledge or consent of his attorney. Chamberlain executed and delivered to the plaintiffs a full satisfaction for the whole of the judgment, which was filed with the clerk of the Circuit Court on October 5, 1914. Defendant Frank Holmes, who was attorney for Chamberlain in the original action and also in the first suit in equity, advanced about \$50 for costs and disbursements. He now claims an interest and lien upon the judgment for his fee. After the

settlement of the judgment Chamberlain absconded without compensating his attorney or other persons to whom he was indebted, and whom he had promised to pay with the proceeds thereof. No notice of a lien upon the judgment was served or filed in order to perfect an attorney's lien under Section 1088, L. O. L. The right to such a lien depends upon the notice: *Stearns v. Wollenberg*, 51 Or. 88 (92 Pac. 1079, 14 L. R. A. (N. S.) 1095). The attorney for Chamberlain filed a motion in the first suit of Henry A. Townsend and Eunice Townsend against R. H. Chamberlain and William Esch, sheriff, which was instituted for the purpose of setting aside the original judgment as fraudulent. This was after a final decree had been entered in the suit. The motion was supported by affidavits asserting the claim of the attorney's lien, and that the settlement and satisfaction of the judgment were in fraud of his rights. Upon the motion the Circuit Court granted an order canceling the satisfaction of the judgment and authorizing the collection of the balance after deducting the amount paid upon settlement.

2. It appears from the affidavits that Chamberlain wronged the attorney who had served him, but no fact is stated therein indicating that the satisfaction was obtained fraudulently, or that the settlement was invalid as to the Townsends. The proceeding upon the motion was not a part of that suit, and did not come within the issues of the same, nor authorize the court to set aside the satisfaction of the judgment. No regular suit or proceeding was instituted for that purpose. The Townsends were not served with the summons or notice, and did not appear. Chamberlain had departed for parts unknown. The parties in interest were different from those in the suit or action at law,

in that the surety on the undertaking on appeal, against whom the judgment was rendered, was interested. A copy of the motion was served upon the attorney who had acted formerly for the Townsends, but he made no appearance, as he understood the matter pertained to some correction of the decree already passed. The motion involved an entirely new matter, which occurred after the decree in that suit had been rendered, was foreign thereto, and could in no way be adjudicated in that manner. It was asserted upon information and belief that the satisfaction was obtained by means of threats. What they were is in no way disclosed. No facts were stated which would authorize any court to annul an agreement or settlement. The order of the court, canceling the satisfaction and authorizing the collection of the remainder of the judgment, was a nullity. The evidence in the present case, however, shows that the settlement was a compromise, and fairly made on the part of the Townsends.

3, 4. Under Section 1088, L. O. L., an attorney has no lien on a judgment as against the judgment debtor, unless a notice thereof is given and filed; and where the debtor in good faith pays or satisfies the judgment before notice, the attorney cannot enforce the judgment as against him: *Day v. Larsen*, 30 Or. 247 (47 Pac. 101); *Wagner v. Goldschmidt*, 51 Or. 63 (93 Pac. 689). Under the conditions mentioned above the attorney for Chamberlain instructed the defendant sheriff to enforce the collection of the balance of the judgment after deducting the amount paid on settlement, and the present suit was instituted to enjoin such proceeding, for the reason that the same would be a cloud upon the real estate of plaintiffs.

“One of the plainest cases which can be put of the propriety of granting an injunction to a judgment at law is where it has been in fact satisfied, and yet the judgment creditor attempts to set it up and enforce it either against the judgment debtor or against some person claiming under him, who is thereby injured in his property or rights”: 2 Story, Equity, § 876.

See, also, *Brinckerhoff v. Lansing*, 4 Johns. Ch. (N. Y.) 69 (8 Am. Dec. 538); *Shaw v. Dwight*, 16 Barb. (N. Y.) 536; *Meyer v. Tully*, 46 Cal. 70; *Bowen v. Clark*, 46 Ind. 405. A sale upon execution will be enjoined in equity when it would constitute a cloud upon the title to realty: *Cox v. Smith*, 10 Or. 418; *Wilhelm v. Woodcock*, 11 Or. 518 (5 Pac. 202).

The decree of the lower court will be reversed, and one entered inhibiting the sale upon the execution as prayed for in plaintiffs' complaint; neither party to recover costs in either court.

REVERSED. DECREE RENDERED.

MR. CHIEF JUSTICE MOORE, MR. JUSTICE HARRIS and MR. JUSTICE BENSON concur.

MR. JUSTICE EAKIN absent.

Argued June 16, affirmed July 11, 1916.

KLOVDAHL v. SPRINGFIELD.*

(158 Pac. 668.)

Pleading—Conclusion of Law.

1. The statement of the complaint that "notice was not given as required by the charter," instead of stating the facts, leaving the court to draw the conclusion whether or not the charter requirements were fulfilled, is but a conclusion of law, not issuable, and not requiring denial, and giving plaintiff no standing to litigate lack of jurisdiction from failing to give notice as required.

Municipal Corporations — Street Improvements — Sidewalks — Remonstrance.

2. Under a city's charter (Sp. Laws 1893, p. 245), in terms giving right of remonstrance against improvement of a street or alley by grading or graveling, there is no right of remonstrance against laying of sidewalks by the city at the expense of the abutting realty.

Municipal Corporations—Street Improvements—Remonstrance.

3. A remonstrance against street improvements should show that its signers are the owners of two thirds of the adjacent property, necessary under the charter to be effectual.

Quieting Title—Cloud on Title—Assessment Ordinance.

4. If an assessment ordinance utterly fails to describe one's property, it does not constitute a cloud on his title.

[As to right to maintain action to remove lien of special assessment as cloud on title, see note in Ann. Cas. 1914A, 888.]

Municipal Corporations—Assessment Ordinance—Description of Land.

5. Description of land in an assessment ordinance is sufficient, if with it a surveyor, either with or without the aid of extrinsic evidence, could locate the premises with reasonable certainty, though, while the land is in block 2, it is recited to be lots in block 21.

Municipal Corporations—Sidewalk Construction—Waiver of Lien.

6. A city does not waive its lien for an assessment for construction of a sidewalk, because it does not immediately issue its warrant for the collection at the end of the 20 days in which the tax may be paid by the land owner.

From Lane: JAMES W. HAMILTON, Judge.

*As to general liability of municipality which is unable or has failed to enforce assessments for local improvements, see note in 32 L. R. A. (N. S.) 163 et seq. REPORTER.

In Banc. Statement by MR. JUSTICE BURNETT.

This is a suit by Simon Klov Dahl against the town of Springfield and others, in which the plaintiff undertakes to give a history of the doings of the council of Springfield resulting in building a cement sidewalk in front of his property and docketing a lien against his holdings for \$580.21, whereby, as he avers, a cloud was created upon his title. Contending that the proceedings of the city in that respect were void, he brings this suit. He declares that the charter of the town requires notice to be given of the time when and place where the contract for making an improvement will be let, referring also to the ordinance providing for the same and the date of its passage. He then avers:

“That said notice was not given for the letting of the contract for the construction of the sidewalk and curbs referred to herein, as required by the charter of said town.”

According to his statement, the charter directs that, if the owners of two thirds of the property adjacent to the proposed improvement file with the recorder a written remonstrance before the letting of the contract, no contract shall be let. He complains:

That a “remonstrance was filed on or about November 30, 1908, against the said improvement proposed to be made, and was signed by the owners of more than two thirds of the property adjacent to the said proposed improvement,” and that no notice of the same was taken by the council except that it was filed.

He asserts, also, that the city has waived its lien because it did not immediately issue its warrant for the collection of the tax when the owner failed to pay the same within 20 days after its docketing. He claims, too, that the ordinance apportioning the amount

to be collected from his property for the improvement does not correctly describe his holding, in that the enactment locates it in block 21, whereas it is in block 2, in the original town of Springfield.

The defendants answered, enlarging somewhat upon the history of the proceeding. A reply was filed, challenging the new matter of the answer in some particulars, a hearing was had, and a decree entered dismissing the suit, from which the plaintiff appeals.

AFFIRMED.

For appellant there was a brief over the name of *Messrs. Thompson & Hardy*, with an oral argument by *Mr. Charles A. Hardy*.

For respondents there was a brief with oral arguments by *Mr. John H. Bower* and *Mr. Sjur P. Ness*.

MR. JUSTICE BURNETT delivered the opinion of the court.

1. The chief complaint of the suitor is that the city was without jurisdiction, because notice was not given of its intention to build the walk. The allegation of the complaint, however, presents no issuable statement on this subject. Good pleading requires that, instead of saying that "notice was not given as required by the charter of said town," the facts relating to that matter be averred, leaving the court to draw the legal conclusion of whether or not the requirements of the charter have been fulfilled: *O'Hara v. Parker*, 27 Or. 156 (39 Pac. 1004); *Zorn v. Livesley*, 44 Or. 501 (75 Pac. 1057); *State v. Malheur County Court*, 54 Or. 255 (101 Pac. 907, 103 Pac. 446); *Equitable Saving & Loan Assn. v. Hewitt*, 55 Or. 329 (106 Pac. 447); *Morton v. Wessinger*, 58 Or. 80 (113 Pac. 7); *Long v. Dufur*,

58 Or. 162 (113 Pac. 59); *Moore v. Fowler*, 58 Or. 292 (114 Pac. 472); *Proebstel v. Trout*, 60 Or. 145 (118 Pac. 551); *McDaniel v. Chiaramonte*, 61 Or. 403 (122 Pac. 33); *Splonskofsky v. Minto*, 62 Or. 560 (126 Pac. 15); *Scholl v. Belcher*, 63 Or. 310 (127 Pac. 968); *Shipman v. Portland Const. Co.*, 64 Or. 1 (128 Pac. 989); *Equi v. Olcott*, 66 Or. 213 (133 Pac. 775); *Purdin v. Hancock*, 67 Or. 164 (135 Pac. 515); *Barnard v. Houser*, 68 Or. 240 (137 Pac. 227); *Templeton v. Cook*, 69 Or. 313 (138 Pac. 230); *Farrell v. Kirkwood*, 69 Or. 413 (139 Pac. 110). The statement of the complaint on this point is but a conclusion of law, which the authorities cited demonstrate is not issuable and does not require denial. The plaintiff has no standing to litigate the lack of jurisdiction on the part of the city council.

2, 3. The provisions of the charter involved are found in the act of February 10, 1893 (Sp. Laws, 1893, p. 245). Section 68 empowers the council, whenever it deems it expedient, to establish or alter the grade of or to improve or repair any street or alley, or any part thereof, and says that this authority includes the power to improve, build or repair the sidewalk, pavement or curbing on any street or alley, to determine and provide for everything convenient or necessary concerning such improvement, and for the construction, cleaning and repairing of cross-walks adjacent to the property by the owner thereof, or by the town at the expense of such owner, and that such expense be a lien upon such property. Section 70 says that the work of improvement by grading or graveling any street or alley shall be let by contract to the lowest responsible bidder. Section 71 declares that no contract to grade or gravel any street or alley shall be let until after the recorder, by order of the common

council, shall have given 10 days' notice thereof, either by publication in a newspaper or posting the same in public places. Section 72 provides the terms of such notice. Section 73 reads thus:

“The owners of two thirds of the property adjacent to such street or alley, or part thereof, to be improved, have the right to make and file with the recorder a written remonstrance against the proposed improvement or repair at any time before the last two preceding days stated in said notice for the letting of such contract.”

Section 74 provides:

“If such remonstrance be filed as in the preceding section provided, no contract shall be let for the work of grading or graveling of such street or alley, and no further proceedings shall be taken for the same or similar improvement of such street or alley for six months after the filing of such remonstrance, except on petition of the owners of two thirds of the property liable therefor.”

Finally, the following section says:

“If no remonstrance be filed as above provided, the contract to grade and gravel such street or alley may be let as in such notice stated.”

The paper relied upon as a remonstrance appears in the record, and upon the point of ownership as qualifying the remonstrators it states:

“As grounds for this remonstrance we allege that we are the owners of real estate abutting on said proposed improvement and the cost of said improvement would be in excess of the benefits to be derived from the same.”

The charter clearly distinguishes between the building of sidewalks and the improvements of a street by grading or graveling. No provision is made for

remonstrating against laying down a sidewalk at the expense of the abutting realty. The owner's right to remonstrate is confined to the matter of improving the street or alley by grading or graveling. Moreover, the instrument called the remonstrance does not show that the signers are the owners of two thirds of the property adjacent to the street or alley, and hence is insufficient for the purpose designed. The opposition cannot rest partly in writing and partly in parol, or somewhat in averment and otherwise in proof. The grounds of the opposition must be stated in the remonstrance itself as fully as required by the charter.

4, 5. With respect to the manner in which the property is described by the city, it would be sufficient to say that if the assessment ordinance utterly fails to describe the plaintiff's property, it would not constitute a cloud upon his title. On the other hand, if it is sufficient to identify his property, he has no standing in court to complain upon that ground. The description in the ordinance levying the assessment reads thus:

“Beginning at the northwest corner of block 21 in the town of Springfield, thence east along the south side line of Main Street a distance of 302.7 feet to the northeast corner of said block, thence south to the southeast corner of lot 1 in said block 21, thence west to the southwest corner of lot 2 in said block 21, and being the east side line of Mill Street, thence north along the east side line of Mill Street to the place of beginning, being lots numbered 1 and 2 in said block 21, in the town of Springfield, Lane County, State of Oregon.”

The plaintiff says his property is in block 2 of the original plat of the town of Springfield, and this is his only criticism of the city's designation of his realty. The rule on this subject is thus laid down by Mr.

Justice MOORE in *Smith v. McDuffee*, 72 Or. 276, 284 (142 Pac. 558, 560):

“In construing the language of deeds or other writings relating to real property, it has been held that the description of land therein contained was sufficient, if, with the stated instrument before him, a surveyor, either with or without the aid of extrinsic evidence, could locate the premises with reasonable certainty: *Willamette Co. v. Gordon*, 6 Or. 175; *House v. Jackson*, 24 Or. 89 (32 Pac. 1027); *Hayden v. Brown*, 33 Or. 221 (53 Pac. 490); *Bogard v. Barhan*, 52 Or. 121 (96 Pac. 673, 132 Am. St. Rep. 676); *St. Dennis v. Harras*, 55 Or. 379 (105 Pac. 246, 106 Pac. 789).”

See, also, *Talbot v. Joseph*, 79 Or. 308 (155 Pac. 184); *McMaster v. Ruby*, 80 Or. 476 (157 Pac. 782). We apprehend that any ordinary surveyor, guided by the rule thus laid down, could locate the property described by the ordinance.

6. The city does not waive its lien because it does not immediately issue its warrant for the collection at the expiration of the 20 days in which the tax may be paid by the freeholder. The pleadings and the evidence do not disclose any legal or equitable complaint against the burden laid upon the plaintiff's property by the proceedings in question.

The decree of the Circuit Court is affirmed.

AFFIRMED.

MR. JUSTICE EAKIN and MR. JUSTICE HARRIS did not sit.

Argued June 12, affirmed July 11, 1916.

REAM v. REAM.

(158 Pac. 670.)

Divorce—Evidence—Sufficiency.

1. In a suit for divorce, evidence *held* to warrant a decree for plaintiff on the ground of cruel and inhuman treatment.

[As to cruelty as ground for divorce, see notes in 29 Am. Dec. 674; 73 Am. Dec. 619; 40 Am. Rep. 463; 51 Am. Rep. 736; 65 Am. St. Rep. 69.]

From Klamath: HENRY L. BENSON, Judge.

In Banc. Statement by MR. CHIEF JUSTICE MOORE.

This is a suit by Clara Ream against Edward Ream for a divorce, on the alleged ground of cruel and inhuman treatment and personal indignities rendering her life burdensome.

The answer denies the allegations, and, for a further defense, avers that, without cause, the plaintiff is quarrelsome, fault-finding and jealous, and is inclined to misconstrue the language and acts of defendant and of others to their detriment. The averments of new matter in the answer were put in issue by the reply, and, the cause having been tried, the plaintiff secured the divorce, was decreed to be the owner of an undivided one third of the defendant's real property, and also awarded the sum of \$500 as alimony.

AFFIRMED.

For appellant there was a brief and an oral argument by *Mr. E. L. Elliott*.

For respondent there was a brief over the name of *Messrs. Stone & Gale*, with an oral argument by *Mr. G. F. Stone*.

For the state there was a brief and an oral argument by *Mr. John Irwin*, Prosecuting Attorney.

Opinion by MR. CHIEF JUSTICE MOORE.

1. The parties were married December 20, 1906, in Klamath County, Oregon, where they have ever since resided. The plaintiff's daughter by a former marriage lived with them on their ranch about ten miles from Klamath Falls. At the time of the trial, the plaintiff was 47 years old. She had been in ill health for several years, and suffered from an ailment which, in the opinion of her physician, could have been cured by a minor operation. This infirmity with sex frailty at her period of life induced extreme nervousness, which at times prostrated her. Her hearing is also considerably impaired, and, like all persons similarly afflicted, she is quite sensitive on the subject and is liable to misconstrue what is said in her presence. The defendant did not seem to have much sympathy for the plaintiff in consequence of her nervous condition, or appear to accede to her wishes in the general management of their home. Thus, on September 8, 1911, Mrs. Ream, preparing to board a lady teacher, moved a bed from a room which she and the defendant occupied, and had set it up in another room which was occupied by her daughter, when he, returning to the house and seeing what the plaintiff had done in his absence, remarked: "This has got to be stopped right at once. I want that bed. It is coming right back in here." She replied: "No, sir; it is not." He said, "It will," and started toward the door, which she closed. He forced the door open and she took hold of the bed trying to prevent its removal, when he grasped and forced her into a chair, making her wrists black and blue. He admits this encounter, but says

that, when it occurred, the bed had not been set up in the room to which it had been taken. His chief reason for such conduct was an objection that Mrs. Ream was giving to her daughter the best furniture in the house, reserving for herself and him the poorer household goods.

The plaintiff testified that on March 24, 1913, she had been assisting in putting up meat, working so hard that she was scarcely able to stand, and at the dinner-table she said to the defendant that other women, after performing the necessary housework, found leisure for rest and reading, but she could not do so; whereupon he informed her that, if she did not get in and do the work, she would find herself getting up out in the road. The defendant admits he made this remark, but asserts it was uttered in their bedroom and was meant by him as a joke and so understood by her.

Mrs. Ream testified that, after she was ill at the ranch about four days, the defendant took her to Klamath Falls, and, though she was then suffering severely and in great agony, he did not inquire if she would employ a physician or engage anyone to wait upon her, and that he never called upon her while she was then ill. She also stated upon oath that, when the defendant came into their home, he made slighting remarks to and about her. She admitted on cross-examination that she often replied to him in a similar manner, but that she never employed any insulting language in response to his disrespectful observations. She further testified that the defendant told her to leave his bed and never come near it again, saying: "I am through with you now and for always." Mr. Ream stated upon oath that he was in doubt as to whether or not he made this declaration. He testified, however, that the plaintiff slept in his room on a cot

until she moved it into another bedroom after a hired girl left. Mrs. Ream further testified that on April 15, 1913, the defendant told her to shut her mouth or he would slap her face, at the same time waving his arms in a threatening manner, thereby causing her to believe he would put his menace into execution. The defendant's explanation of this remark and demonstration is that, a hired girl having left, a letter came to the ranch for her; that he readdressed the envelope, whereupon Mrs. Ream remarked: "You have sent the hired girl away. You want to send my daughter away and then get Mr. and Mrs. Lewis to come here." In reply to this observation he said: "Clara, many men would slap you for that: that is, for what you are saying." "I drew my hand back, but we were six feet apart."

Mrs. Ream's malady and its resulting nervousness undoubtedly tended to make her suspicious. She believed the men employed by the defendant to assist in the farm work were in league with him to annoy her. Thus, on May 15, 1913, when she was visiting at the home of a neighbor, Chauncey Standish, one of the defendant's employees, called and after some conversation said to the plaintiff: "You lie right there. I will make you swallow some of these things you have been saying." She testified that, on her return that evening, she reported what the hired man had said to her to the defendant, who remarked: "I suppose you did lie, or he would not have said so." The defendant stated upon oath that he was not informed of such language on the part of Standish until about a week after it occurred, when he discharged him. The plaintiff testified that, at the breakfast-table, August 18, 1913, the day she finally left the ranch, Harry Blair, another employee, made a slighting remark to her

daughter, whereupon the witness remarked to him: "You keep quiet and let her alone; she is not saying anything to you or about you, in any way or shape. You should attend to your own affairs. You are mixing in family affairs here which you have no right to do whatever"; that Mr. Blair replied: "You shut your mouth and tend to your own business"; that Mr. Ream was present and said to his employee: "Go ahead and say what you please, I am here"; and that the defendant's remark made her sick.

Mr. Blair, as the defendant's witness, testified that Mrs. Ream had informed him she was having trouble and expected to leave the ranch in the fall of 1913; that on August 18th of that year, the day she finally left, the defendant told him to say nothing to her; that at the table Mrs. Ream informed the witness he was the cause of her leaving; that to this observation the employee stated: "I am going to tell you what is the cause of your leaving. It is your untruthfulness and deceitfulness. That is the whole cause of your leaving." The witness continued: "She called me a big idiot in two instances." Mr. Ream, referring to the conversation last detailed, testified that he cautioned Blair before he went into the house that morning; that the plaintiff told this employee he was the cause of her leaving, and that the witness was upholding him.

The plaintiff was jealous of her husband, and probably this envious suspicion was caused by her illness and its consequent nervousness and her impaired hearing. She testified that, on April 17, 1913, she discovered the defendant and a hired girl at the ranch in the separator-room, the door of which was then closed; that they remained in the room about ten minutes, and, as he came out, the witness inquired what they had been doing, to which he replied that it was none of

her business, that he was running the house, and she could keep her mouth shut. The testimony of the defendant and of the girl referred to is to the effect that he went into the room mentioned to repair the separator which he had taken apart for that purpose; that the girl, not knowing he was in that place, entered it to get some potatoes to cook, and seeing the exposed machinery she examined it and for about eight minutes remained in the room, the outer door of which was during all that time open. It is not supposed for a moment there was any impropriety in the conduct referred to. The only thing for which the defendant is at all censurable was his answer to the plaintiff's inquiry as to what he and the girl were doing in the room as hereinbefore specified.

The testimony of the defendant's witnesses tends to show that the plaintiff objected to his playing cards at their home with other women, even when she was engaged in the game at the same table.

It is believed that a fair examination and consideration of all the testimony will show that the plaintiff's temper and disposition were not the best at all times, but that her peculiar temperament was due to ill health which superinduced extreme nervousness, and that her defective sense of hearing also caused misunderstandings; that the defendant, knowing her infirmities, did not extend to her that kindness and forbearance which her then physical and mental condition demanded; that he neglected her when she was sick; and that he addressed language and made demonstrations toward her when she was ill that amount to cruel and inhuman treatment, entitling her to the divorce and to an undivided one third of his real property.

This conclusion is reached without considering any of the evidence that was received upon a motion to open

the cause, after it was submitted, for the purpose of taking testimony as to the alleged conduct of the defendant toward the plaintiff, occurring after the suit was instituted, without filing a supplemental complaint.

The plaintiff asserts the defendant is indebted to her in the sum of about \$400 for labor which she performed for him prior to their marriage, and that he also owed her about \$1,900 for borrowed money. If these sums are collectable from him, a judgment therefor will, with the payment of his other obligations, so exhaust his property as seemingly to render it inequitable that he should pay to her the further sum of \$500 as alimony.

The decree appealed from will therefore be modified so as to eliminate the award of \$500, but in all other respects affirmed.

AFFIRMED.

MR. JUSTICE BENSON and MR. JUSTICE EAKIN not sitting.

MR. JUSTICE BURNETT delivered the following dissenting opinion:

The plaintiff, having been divorced from a former husband, was employed by the defendant for about two years, and then married him December 20, 1906. As she did during her former matrimonial venture, she kept an account of her differences with her husband, which for convenience may be called the book of transgressions, and on September 4, 1913, commenced this suit against him for a divorce, for an undivided third of his real property, and for \$2,500 alimony, in gross. The specifications of cruel and inhuman treatment upon which she relies are thus set out in her complaint:

“That on or about the eighth day of September, 1911, at the home of the plaintiff and defendant, near Klamath Falls, in said county and state, the defendant, without any cause or provocation therefor, and while in a violent fit of temper, did forcibly lay hands on plaintiff, pinch her arms, and violently push her into a chair; that, as a result of such attack, the plaintiff's arms were discolored for a long time, and that she suffered great mental anguish.

“That at the same place, on or about March 24, 1913, and while plaintiff was so ill that she was unable to perform the usual household duties and was practically confined to her bed, the defendant, without any cause or excuse, stated to plaintiff that, if she, plaintiff, did not get in and work, she would find herself getting up out in the road; that the effect of such statement was to cause plaintiff such mental suffering as to very greatly aggravate her illness.

“That on or about the fifteenth of April, 1913, when plaintiff tried to induce defendant to refrain from a course of unseemly conduct, the defendant flew into a rage of passion and threatened to slap plaintiff's face; that plaintiff was fearful that such threat would be carried into execution and suffered great mental worry in consequence thereof.

“That on April 15, 1913, defendant, without any excuse therefor, stated to plaintiff that she, plaintiff, was out of his bed and that she would never come near same again, and that he wanted plaintiff to understand that he was through with her for all time.

“That on or about April 15, 1913, near the said home of plaintiff and defendant, the defendant sent one Chauncey Standish, his hired man, to a neighbor's house, where plaintiff was making a short visit, at which time Standish unjustifiably and without excuse, and in the presence of said neighbors, used grossly insulting remarks toward plaintiff, calling plaintiff a liar and using other unbecoming language toward her, and that plaintiff immediately sought the protection of the defendant and informed him of the hired man's inexcusable insults, and that defendant, instead of

remonstrating with said Standish, stated to plaintiff that she did lie or the hired man would not have so accused her.

“That on July 19, 1913, one Harry Blair, said defendant’s hired man, entered the home of the plaintiff and defendant in said county, and, flourishing a large loaded revolver in his hand in a threatening and dangerous manner, stated at such time that he carried that gun to protect himself when Ed, meaning the defendant, was gone; that it was sure fire and that he was a good shot. That plaintiff was in a weak nervous condition at such time, was greatly alarmed at such conduct, and suffered great bodily pain by reason of such fear.

“That on or about August 18, 1913, the said Harry Blair, defendant’s hired man, at the breakfast-table, in the presence of defendant, used coarse and insulting language toward plaintiff, telling plaintiff that she was a liar, and that at such time defendant told the said Blair to go ahead and say what he pleased to plaintiff, and that at such time and at all other times, concerning which the disrespect toward plaintiff of the said men has been herein described, defendant inspired and encouraged such conduct on their part and made the same his own.

“That, to further vent his spite and hatred toward plaintiff and to add to her pain of mind, defendant has, for a number of years, maliciously taken the hired help into his confidence, told them family secrets, discussed household problems with them, and has repeatedly shown such close intimacy with said household servants as to add very greatly to plaintiff’s worry and illness, and that during all of said time defendant studiously and persistently snubbed, slighted and ignored plaintiff, much to her mental distress and impairment of her health; that on the seventeenth day of April, 1913, at the home of plaintiff and defendant, the plaintiff discovered defendant and their then hired girl in the separator-room, the door to said room being closed at such time; on the 22d of the same month, plaintiff again saw the defendant and said hired girl

in the same room, with the door to said room closed; that defendant frequently, immediately prior and subsequent to said last-mentioned dates, drove to Klamath Falls in company with said hired girl and remained all day; that the defendant adopted such a course of conduct solely for the purpose of vexing and annoying plaintiff, and that such acts did greatly worry and annoy plaintiff, so much so that her health has become permanently impaired.

“That, on or about August 10, 1913, owing to the defendant’s treatment of plaintiff as herein set forth, the plaintiff’s mind was affected to such extent that she became greatly enfeebled in body and, from said date until on or about August 18, 1913, was unable to leave her bed; that during such illness the defendant completely ignored her and never administered to her help or comfort in any manner whatever; that, as soon as plaintiff was able to travel, to avoid defendant’s treatment of her, as herein described, and to protect her mind and health from further injury, she was forced to leave the home of plaintiff and defendant and come to Klamath Falls, where she now resides.”

Without asking for affirmative relief, the defendant traverses all the charges made by the plaintiff and alleges:

“That since the said marriage of plaintiff and defendant, plaintiff has been quarrelsome, fault-finding and jealous without any cause therefor, and inclined to misconstrue the language and acts of the defendant, their friends, neighbors and employees to the detriment of their domestic felicity.

“That defendant has, at all times, borne the foregoing patiently and has endeavored to pacify plaintiff in her said acts, and to mollify her said disposition to the end, that their said married life might be happy and pleasant, but to no avail.”

This new matter having been denied by the reply, the cause was heard on the testimony and the parties rested. Before argument, however, the plaintiff filed

an affidavit to the effect that, since the hearing, she had gone to California and had there received mail forwarded to her from Klamath Falls, which she said she had every reason to believe had been opened, and that, when the package arrived, it contained a note or writing in the handwriting of the defendant in the following language:

“Something on your hands you do not want and had to run away to try and hide it and called it rheumatism. From the ranch.”

Without filing any supplemental complaint or other pleading, she sought and obtained permission from the court to reopen the case and give evidence concerning this matter, which, she claimed, imputed to her a loathsome disease and caused her to suffer great humiliation, making her life burdensome, all over the objection and protest of the defendant. The court finally entered a decree granting the plaintiff a divorce and an undivided third in fee of the defendant's real property, together with \$500 alimony, and costs and disbursements, from which determination the defendant appeals.

Section 108, L. O. L., says:

“The plaintiff and defendant, respectively, may be allowed, on motion, to make a supplemental complaint, answer, or reply, alleging facts material to the case, occurring after the former complaint, answer, or reply.”

Under this section, it has been decided by this court that proceedings, occurring after the pleadings are made up, are not admissible in evidence if not alleged in supplemental pleadings: *Trotter v. Town of Stayton*, 45 Or. 301 (77 Pac. 395); *Noble v. Beeman-Spauld- ing-Woodward Co.*, 65 Or. 93 (131 Pac. 1006, 46 L. R. A.

(N. S.) 162); *Wagenaar v. Beeman-Woodward Co.*, 65 Or. 109 (131 Pac. 1023). As long ago as the case of *Atteberry v. Atteberry*, 8 Or. 224, it was held that an assault committed since the commencement of the suit is no ground for a divorce, and in *Jones v. Jones*, 59 Or. 313 (117 Pac. 414), this court held that new acts of cruelty must be the basis of a new suit. As a preliminary, therefore, the matter about the alleged interference with the plaintiff's mail must be laid out of the calculation.

As stated in her pleading and memorandum, the first alleged indignity of which the plaintiff complains happened September 8, 1911, at the home of the parties near Klamath Falls, Oregon. According to her narrative, she was preparing to board the public school-teacher and was moving a bed from one room into another when the defendant discovered what she was doing, and said: "What does all this mean, indeed?" She told him she "was getting ready to straighten the home up, to get it ready to board the teacher." Her testimony continues thus:

"He says, 'This has got to be stopped right at once.' I says, 'What is the matter with you?' He says, 'It is just this: I want that bed; it is coming right back in here.' I says, 'No, sir; it is not,' and with that he says, 'It will,' and he went in the bedroom, and took the bed all down, and attempted to carry it back in the room it was in. He said, 'You will not take that bed back in there again.' I said to him, 'You will not take that bed back,' and, when he attempted to do so, I took hold of the board of the bed, and tried to restrain him from putting it in the room where I had taken it out. He grabbed me by both wrists, and slung me around, and into a chair, and my arms and wrists were black and blue for two weeks, and, he also hurt my back and shoulder at the same time."

On cross-examination she said she was moving the bed into the room of her daughter by the former marriage. She says her wrists were black and blue for about two weeks, but no other witness mentions the subject. She did not complain to him at the time, but afterward she says:

“I told him that I never saw a husband come into the house and treat his wife in the style and manner that he did me. He simply answered, ‘That is all right;’ he says, ‘I don’t want you to bother it.’ ”

The defendant’s account is that he had bought a new bedstead for their room and had given her to understand that he wanted it to remain there. He then says:

“She took advantage of my absence one day to remove it into her daughter’s room, that was to the opposite bedroom, to change one bedstead to the other room, and I happened to come into the house just after she had exchanged the bedsteads. She had the habit, offhand, to put all of the old furniture in our room, and the new furniture in the girl’s room, and I had remonstrated with her on the matter, and was pleading for her cause just as much as my own. I told her we were getting old in years, and I pleaded of her to take a little comfort for ourselves. I started to go in the bedroom, and at that time she closed the door on me, and held it, resulting in me forcing the door open. The door opened into the bedroom. * * She was in the bedroom sweeping at the time, and she held the door. I forced the door open, and she still put up a scrap to prevent me from taking hold of the bedstead. I just took her by the arms, and got her outside, and sat her down in a chair in the kitchen. I did not use any more force than was necessary to accomplish that act, and then I proceeded to put the bedstead back, and set it up in my and her bedroom, and asked her to let it stay there, which she did.”

He states further that she made a pallet on the floor at the foot of the bedstead and slept there that night, and the next night when she attempted to go to bed there—

“I told her good-naturedly, I said, ‘Clara, that is all foolish, you acting that way.’ I says, ‘You know one thing, you can’t rest, and you can’t sleep.’ I says, ‘Get up in the bed here, where you can rest,’ and she did so. She did not say anything about it; she just got into bed.”

The pleadings do not reveal any untoward event, until about two and one-half years later, when occurred the incident of March 24, 1913. From that time forward, according to the jeremiad of the complaint and the book of transgressions, the plaintiff was like the “unhappy master whom unmerciful disaster followed fast and followed faster,” for all her woes happened between that date and the 18th of the following August, when she packed up her belongings and left the defendant. In answer to the question: “What was the nature of that?” referring to the affair in March, she gives the following extremely condensed account:

“He told me at that time, on that date, that if I did not get in and work, I would find myself getting up out in the road.”

She locates this transaction at the dinner-table. On cross-examination she enlarges upon the subject in this language:

“He just said—we was talking about butchering, putting the meat away, we had two big hogs—and we had put all of that meat away, and made lard, rendered it out, made sausage, and cleaned up everything, and this was a short time after that. We talked about it at the dinner-table one day, about neighbors that had been butchering a lot of hogs, and I said it was so nice for that lady. I spoke about the neighbor that she

does not have any of that kind of work to do in the house, and I says, 'Her husband is kind to her, and he takes all that work outside, and keeps it out,' and, I says, 'When she gets her work done up,' I says, 'She has a little time for something else besides working all of the time.' I says, 'She likes to read real well,' and he says, 'You act like that, or do that, you will find yourself getting up out in the road.' "

The defendant's narration of this affair is this:

"The time I made that statement to her, she was lying in bed; I had been sitting on the bed, and had been joshing her good-naturedly, and she was joshing me in a friendly way. I was not mad, nor she was not mad, and when I got ready to go out, I just made the assertion, in a joking way, if she didn't get up, she would find herself coming up out in the road. There was no ill feeling between us; it was all said in a joking way."

He says that she did not cry, remonstrate nor make any objection whatever to this statement.

The next chapter opens April 15, 1913. Of that she tersely says: "He told me at that time to shut my mouth or he would slap my face." On cross-examination she explains her statement of this clash in the following language:

"He came into the house, and he spoke about me doing some work, or something that was to be done there. I told him I had not had the time to do it yet; I had been busy all the whole time, as busy as I could be, and he said, 'That is just like all your work amounts to.' He mentioned one time, not there, 'What you do never amounts to anything, anyway.' I said my work amounted to enough to save him at least \$20 a month expense, if it was not very much. I told him, at the time he had hired help, he paid them all the way from \$35 to \$40 a month, and he says, 'That is all right on the side,' and he said to me, he says, 'That is all right; when I want help, I will have

it.' 'Yes,' I says, 'that is all the respect you have for me.' I says, 'You have just as much respect for me as you have for an old nigger servant, if you had one in the house.' I says, 'You would show them more respect than you would me, for you would go up to them, and slap them on the back, and give them kind words and a pleasant smile once in a while, but you have not me.' That is when he walked to me, and drawed his hand back, and told me to shut my mouth, or he would slap my face.'"

The defendant's account of this affair is this:

"We was standing, or, rather, I was on the porch, and she came out on the porch, and asked me why the hired girl had left, meaning Miss Halousek. She had went a few days before, and went to Malin, California, or Oregon, I guess, and I told her I did not know. She says, 'You do know,' and she referred to a letter that did come for the young lady, and she had been gone several days, and I did not think she was coming back, and so I scratched out the address Klamath Falls, and put Malin on it, intending to hand it to the stage-driver, and send it to Malin, where I supposed she was, and my wife understood by that that I had sent the girl away, and, knowing also she was not coming back, had attempted to send this letter to her. I remonstrated with her, and told her, 'No, I had not done so, and that I did not think the girl was coming back, and that was the reason I thought of sending the letter to her. During our controversy over this question, she said several times that she knew very well that I did send the girl away; that I wanted to get her and her daughter away so that I could have Mr. Lewis and his wife up there, intimating that I wanted them there for Mrs. Lewis to keep house, and Mr. Lewis to work on the ranch. I remonstrated with her, and told her she was wrong, there was no truth in it, and she would not say anything, or listen to anything, and abused me.' I says, 'Clara, many men would slap you for that, that is, for what you were saying.' Those are the exact words I said."

He said, although he drew his hand back, he did not attempt to nor make any movement as though he intended to strike her, and that they were six feet apart at the time.

The next grievance is alleged to have happened on the same date. The plaintiff says the defendant told her then to leave his bed and never come near it again, and imputes to him this language: "I am through with you now, and for always." The defendant makes this the outgrowth of the controversy about the bed already mentioned. He said:

"She moved a canvas cot into the bedroom, and made her bed on the cot, at the foot of my bed, and I told her my idea, and remonstrated with her as long as she had a bed she could rest on, and she slept there on that cot the remainder of the time that the hired girl was there. I don't just remember how long that was now."

He says that, after the hired girl left, the plaintiff moved into the other bedroom.

She complains also that about August 10th, she was in bed four days on account of illness, and that the defendant did not come near her nor ascertain whether she needed any medical treatment or medicine. The husband explains this by saying that the plaintiff and her daughter had the habit of doing up the housework, then going into the bedroom, closing the door, and not talking to him at all; that the meals were eaten in silence; that the plaintiff would push her plate over to the far corner of the table as far as possible from the defendant and would not notice him or talk to him; that she would not even do his laundry work, so that he was obliged to take it to town; and that for these reasons he did not force his attention upon her during the four days she mentioned, which were

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just prior to her departure; but that he would have willingly provided for her, had she made known any wants. His explanation is not in any way challenged or denied by the plaintiff or any witness on her behalf.

In support of her charge against him for taking the hired help into his confidence, she says:

“He took them into his confidence in this way: Whenever he came into the house, he would go to them for everything that he wanted to; it did not make any difference if it was about his business or what; he would almost tell them when he was going to town, and when he would come back.”

Her specifications in regard to the defendant's relations with other women, are found in what we call, for convenience, the incident of the separator-room. The defendant had a milk separator in a room adjacent to the kitchen of the premises, adjoining which was a pantry. Between the latter and the separator-room was a door. Another door from the separator-room opened to the outside. The plaintiff, the hired girl and the defendant, according to the former's statement, were all in the kitchen. The defendant went into the separator-room. The plaintiff gives this account:

“He come into the house, and she was in the kitchen; he passed through the pantry into the separator-room. She followed him in there, and they was there for as much as at least ten minutes. When I seen them go in the door, I stepped into the pantry just outside of the door. As quick as she opened the door and stepped out, she saw me standing there. Her face turned crimson, and she threw her head back, and walked past me out in the kitchen. I was standing right where I could see Mr. Ream, and he looked up, and saw me standing there, and blushed and dropped his head, and did not say anything at that time, and he walked out in the kitchen, and very soon he came

out. As he passed before the door going outside, he shouldered the girl, and, grinning, walked on outdoors."

She states that she didn't have any words with him at that time, but afterward she says:

"I asked him what he was doing in there with Madge; why it was that he would act that way in my presence. He said it was none of my business; that he was running the house, and I could keep my mouth shut."

Supplementing this, her complaint says that the "defendant frequently, immediately prior and subsequent to said last-mentioned dates, drove to Klamath Falls in company with said hired girl and remained all day." The hired girl in question testifies that she never went to Klamath Falls or any other place alone with the defendant, and he tells the same story. He says the girl was never off the ranch with him anywhere, much less coming to town. Defendant's account of the transaction in the separator-room is in this language:

"Why, the separator had got out of order the day before, and we could not use it. The bowl got so wobbly we could not use it. We had to set the milk away in pans in the milkroom, and the next day—that same day—I had taken the bearings out, those ball bearings out, and cleaned them, as I thought thoroughly, and had to put them back, and that did not remedy the defect. The belt wobbled just the same, necessitating that I take them out again, and give them an entire overhauling, and that was the time I was in there, working on the separator, and I had some jugs, buckets, there with water in them, and was sitting close to the door. Miss Halousek came in after some potatoes, and, when she opened the door, the door struck against the bucket and she says, 'I did not know you were in here'; she seemed surprised. I moved

back, and she opened the door and came in, and got her potatoes, and I spoke to her about the separator. I had the name plate off the separator, I exposed to view, and some screws, and stuff in there that she had not seen. She spoke about what—she says, ‘I will get some hot water to clean them up,’ and she turned to go out, and as she opened the door, my wife was standing at the side of the door, where the door is hung on against the hinges, leaning kind of against the door, listening. That is the first I knew she was there.’”

He says the outer door of the room was open because he had to have light to work on the machine. He denies shouldering the girl or making any signal to her as he walked out of the room. The girl testifies that she went to the separator-room to get some potatoes kept there for household use, and, while there, the defendant called her attention to one part of the separator not being clean, and she immediately went into the next room and found Mrs. Ream there. In all her testimony about this affair, the plaintiff does not impute to the defendant any wrongdoing. All through her narrative, however, runs a vein of jealousy for which no foundation is disclosed. In all her discourse about the defendant’s actions toward her, she is not supported by any other witness. Indeed, besides her physician, who speaks only of the state of her health, and Mrs. Lewis mentioned further on, the sole witness on her side of the case was one Schumacher, who afterward married the plaintiff’s daughter. He says the defendant forbade him to come to the ranch. The witness thus relates the defendant’s language:

“And he said it was well to stop off the ranch at the present time, and he said he would rather I would not come again, so he told me, he says, ‘Of course, the way things are going on, I am going to have my way.’ ‘After a while,’ he says, ‘I can’t kick them out’; he

says, 'I wish they would go away with you when you go away,' " referring to Mrs. Ream.

The witness further said the defendant told him he was not going to live with the plaintiff again.

Another affair upon which plaintiff counts may be denominated her quarrel with a hired man named Standish. According to the book of transgressions, this happened May 15, 1913. The plaintiff's story is that she had gone to spend the afternoon with Mrs. Lewis. She goes on to state that Standish came to the Lewis residence, and she says:

"He called at the door, and he said, 'I came to borrow the cutter'; he said to her, he said, 'Did you tell Madge [that was the hired girl] that Mrs. Ream said for her not to have anything more to do with me?' She said, 'I did not.' When I heard my name mentioned, I went to the door. He turned from the door, and said to me, 'I thought, the other day, I thought you respected Madge,' and that I said she was a nice girl; I said, 'I did say so, and say so now.' He said, 'Yes, you do'; he said, 'You lie right there.' He said, 'Why did you raise such a kick when her and Mr. Ream went into the separator-room, or into the cellar and close the door?' He said, 'It looked like you respected her, trying to make out she was not the right kind of a girl.' Then he took off his glove, and looked and talked very angry; he said, 'That is just like the women; they will say one thing and another one minute, and then deny it.' He says, 'We will have this straightened up'; I says, 'Yes, indeed we will.' He took off his glove, and swung his hand about, and he said, 'I will make you swallow some of these things you have been saying'; then he turned and walked away."

This is her testimony in support of her allegation that Standish called her a liar. Mrs. Lewis narrates the matter thus:

“While Mrs. Ream was paying me a visit, Chauncey Standish called and said he wanted to borrow the cutter; he meant the disc, and that is what he got. He also said, ‘Did you tell Madge that Mrs. Ream said for her to have nothing to do with me?’ I said, ‘I did not.’ He said, Mrs. Ream not hearing well, he said, ‘There is a lot of other things that is being told up there, and I am going to have it straightened out,’ and Mrs. Ream, on hearing her name called, came to the door also, and he stopped talking to me, and turned to her, and he said, ‘I thought you said you considered or thought Madge was a respectable, nice girl, and a good girl,’ and she said, ‘I do; I did, and I say so now; I think Madge is a nice, good girl,’ and he jerked off his gloves, and shook his head, and really looked angry and mad, and he said, ‘This is like a lot of other things you are telling and denying, and that is the kind of a woman you are; you say one thing one minute, and you deny it the next, and I will have a straightening up of things,’ and Mrs. Ream said, ‘Indeed, I will; I am ready any time,’ and he says, ‘You bet, I am going to make you swallow a few things you have been saying,’ and then he turned and went away.”

Standish speaks of going to the Lewis house to borrow a disc harrow, and then says:

“In the meantime, I thought I would ask Mrs. Lewis if such had been told to her, and I asked her if Madge had ever told her that Mrs. Ream told her not to have anything to do with me, that I was not the right kind of a man, something to that effect, and she said, studying a few minutes, and said she believed she told it. Mrs. Ream denied it at the table that day, and then she heard me talking and came and said she did say it in a way, and a few words passed, and I said, ‘This whole thing will have to be straightened up, or I would like to have it straightened up.’ I think that was about all that was said.”

There is not a syllable of testimony showing that the defendant authorized the conduct of Standish or

even knew anything about it until afterward. The plaintiff says she told him of it that evening. The defendant testifies that it was not mentioned by her until a week or ten days afterward; that he first learned of it from Standish; that he then remonstrated with him and told him he should not have done so; that afterward, when his wife spoke to him about it, he inquired why she had not told him right away, to which she replied that it would not do any good, and he supposed it meant there was no use of kicking up any row about it any further, so he paid no more attention to it. Standish says:

“I spoke to him about it, and told him that I had a little trouble with Mrs. Ream in regard to this, and he says, ‘You ought not to have done it’; he says, ‘You done wrong,’ and it looked very much like he was out of humor, and says, ‘That will only make trouble start.’ ”

Soon after his wife complained of the conduct of Standish, the defendant discharged him.

Again referring to the book of transgressions, we find that the plaintiff, according to her story, had two altercations with another hired man named Harry Blair, the first on July 19, 1913, and the last on August 18th of that year, the day she left the defendant. Of the first she says:

“On July 19th, he came into the kitchen, flourishing his revolver in his hand. He says, ‘This is what I use to protect myself when Ed is gone’ [meaning Mr. Ream]; he says, ‘That was a good shot,’ and he says, ‘I am a good marksman, too.’ He swung himself around in a threatening way just like, ‘If you don’t do as I want you to do —’ and he put it in his pocket and walked outside.”

Her account on cross-examination is as follows:

“Q. How about that instance that you allege he came in flourishing a revolver—will you tell us about that?

“A. Yes, sir. He had been in Mr. Ream’s room, dressing to go to town. He came into the kitchen, and he reached in his coat pocket, and pulled a revolver out and held it in his hand. He walks toward the table, and begin to shooting the cartridges out on the table, and all over the floor, and I says, ‘That makes me nervous for you to do like that,’ and he said he wouldn’t do it again. I says, ‘It was against the law to carry firearms,’ and he says, ‘No, that is all right.’ He kept shooting, and working with it, and showing me how he could fix it so it would not shoot; he pulled a spring in his revolver, and showed me that way he could fix it so it would not go off when he did not want to use it. He says, ‘I just tell you that is a good shot, and I am a good marksman; I had that to protect myself on the ranch when Ed is gone.’

“Q. Did he shoot those cartridges off there in the room?

“A. How is that?

“Q. You say he shot those cartridges there in the room?

“A. He was shooting them out of the revolver on the floor; a lot of them fell on the floor and table, scattered them all over.

“Q. Let me understand, you don’t mean that he was firing the cartridges, simply throwing them out of the gun?

“A. Throwing them out of the gun on the floor and the table.

“Q. How many did he throw out, if you know?

“A. I think there were eight.

“Q. Describe along here, what sort of a looking gun was it?

“A. It was a revolver, about that long (indicating), black and nickel trimmings.

“Q. Just an ordinary, common revolver?

“A. Yes, sir.

“Q. Did you ask him to let you examine it?

“A. He said, ‘I had that to protect myself on the ranch when Ed is gone.’

“Q. Did you ask him to let you examine it, look at the gun?

“A. No, sir; I did not by any means.

“Q. Did you take the gun in your hand?

“A. No, sir; I did not.”

She says she never mentioned this revolver incident to the defendant at all, and he says he never heard of it until he saw it in the complaint. The August jangle happened after the plaintiff and her daughter had packed up their things and were prepared to permanently leave the defendant's home, which they did that very day. The parties, plaintiff and defendant, her daughter and Blair were all at the breakfast-table. She gives this account:

“August 18th, he was sitting at the table eating breakfast, and my daughter, she looked up at him, just glanced up at him, and he says, ‘Why do you look at me in that style and manner for?’ He says, ‘You are looking at something, or doing something you had not ought to do.’ I says to him, I says, ‘You keep quiet, and let her alone.’ I says, ‘She is not saying anything to you, or about you, in any way or shape’; I says, ‘You should attend to your own affairs.’ I says, ‘You are mixing in family affairs here, which you have no right to do whatever.’ He says, ‘You shut your mouth, and tend to your own business.’

“Q. Was Mr. Ream present at that time?

“A. Yes, sir, he was right there at the table.

“Q. Did he make any statement?

“A. He told him to go ahead and say what he pleased; he said, ‘I am here.’ ”

Blair testifies as follows:

“I come in the house, but, before I come in the house, Mr. Ream said, he says, ‘The women have told me that you are the cause of them leaving to-day, and, if they say anything to you, I would rather you not say any-

thing at all, and try to get along with them, if you can, because I think they intend to leave this morning. They have all their things packed.' I intended all right to keep still, but when I went in the house, and we sat down to the table, Mrs. Ream and her daughter, Nieta, was at the table already, and the daughter, Nieta, made a remark to her mother, or Mr. Ream, I don't know which, she looked from one to the other, and then looked at me, and had a frown on her face. I says, 'What is the matter with you now? What are you looking at me in that manner for?' I says, 'What have I done—something wrong? Have I hurt your feelings?' something like that, and I says, 'I would rather you would not look at me that way,' and I says, 'If you can't look at me any different than that, I wish you would look the other way,' and Mrs. Ream was eating at the time, and when she looked up and saw me in a conversation with Nieta, I was carrying my part of the conversation, but she was not saying anything, and she said, 'You better keep still and leave her alone, not say anything to her.' 'Well,' I says, 'I am going to defend myself, if anyone is doing me wrong,' and I says, 'I have got to do my part of it.' I says, 'By the way, Mrs. Ream, your husband tells me this morning, I am the whole cause of your leaving here,' and, I says, 'You had an intention, I believe, before ever we became acquainted. As far as that is concerned, I have nothing against you now, but I don't like to have you charge me with being the cause of your leaving here.' 'Well,' she says, 'you are the cause of me leaving here; you are a big idiot.' I says, 'All right; if I am the cause of your leaving, I am going to tell you what is the cause of your leaving.' I says, 'It is your untruthfulness and deceitfulness, Mrs. Ream, that is the whole cause of your leaving,' I says, 'It is nothing else but that,' and she repeatedly told me to keep my mouth shut, called me a big idiot in two instances."

He flatly denies calling the plaintiff a liar and affirms that untruthfulness and deceitfulness were the only

words he used in regard to her. He further speaks thus on oath:

“Q. What did Mr. Ream say, if anything?

“A. He told me I had better keep still about this matter; he says, ‘I don’t want to have any more trouble with them, that is, my own help, because,’ he says, ‘it is bad enough as it is,’ and he said, ‘If you keep still, I think later on this thing will blow over and very little done.’ He says, ‘I don’t want to have any trouble with them.’ I says, ‘I will tell you, Ed, that is up to you’; I says, ‘I ain’t going to let anyone talk to me like that.’ ‘Well,’ he says, ‘I told you what I wanted you to do, and would rather you did it.’ Me and he, of course, had a little spat about that. It was halfway around out of the house, and he told me, he says, ‘I told you to keep your mouth shut, and why didn’t you do it?’ I says, ‘When a woman tells me I am wrong, I think a man’s obligation is to defend himself,’ and I says, ‘I did not say anything to her, only what was the whole truth.’

“Q. State whether or not, Mr. Blair, at this time, Mr. Ream made the following statement, or words to this effect: ‘You go ahead and say what you please.’

“A. He did not; no, sir; he made no such remark at all, because I remember the only single instance of this case.”

Apropos of the plaintiff’s real estimate of Blair, there was read into the record an extract from a letter written by Mrs. Ream to Miss Halousek, July 25th:

“Harry is still with us; and he is a good boy to work; we like him better all the time, as he takes so much interest in the stock and work of all kinds.”

The defendant says that on this occasion:

“I cautioned Mr. Blair before he went into the house to breakfast. I told him the circumstances, that they had their stuff all packed, and ready to leave, and I supposed they was going away that day, and cautioned

him to be quiet, and not say anything—not kick up any row.”

Speaking of the grievance at the breakfast-table, he says:

“She did not say anything [referring to the girl], and her mother then told him to mind his own business, and I asked him to keep quiet at the table—be quiet and not say anything. I did not consider that he had said anything out of the way then to anyone which I considered to be offensive.”

He denies that Blair called his wife a liar, or words to that effect. He testified that:

“Blair told her, ‘I understand that you blame me, that I am the cause of your leaving here,’ or words to that effect, but he did not say lying or anything of that kind. I says, ‘Keep quiet, Harry, and let this thing blow over.’”

Although the plaintiff's daughter was present at this altercation, she was not called as a witness. As witnesses for the defendant, there were two young women who had worked there and a school-teacher who had boarded in the family. One of the girls testifies that the plaintiff, besides being jealous of the defendant, said he talked too much to the schoolmistress, but the witness declares that the whole conversation was in the presence of all the family and about school matters. This girl, May Hajicek, declares on oath that, on one occasion, while she was at work in the kitchen, where the defendant was shaving, the plaintiff came in from the pantry and angrily slapped a spoon down upon the table. She says she immediately left the room and started to pack her things, when Mrs. Ream came to her and apologized; that the daughter also came in and sought to mollify her; and that the plaintiff said, “I can't help it; he has been

talking to May all morning." This witness also states that at different times the plaintiff would not speak to the defendant. She says she once went to town alone with Mr. Ream between 8 in the morning and 4 in the afternoon. Her parents lived there, and, immediately on arriving at Klamath Falls, she went to her home and spent the day with her family, returning to the ranch later in the day.

The other hired girl, Madge Halousek, states on oath that the plaintiff acted coolly toward the defendant and would not talk to him; that she herself had been warned before she went there to work that the plaintiff was jealous, and she took care not to have any more conversation with the defendant than she really had to, and that nothing improper ever occurred between them. The schoolmistress who boarded there said that the defendant was kind to the plaintiff and was all a husband ought to be; that on the other hand, the plaintiff was in the habit of finding fault with the defendant, and that the witness came to town only once and returned with him. Both she and the other lady witnesses testify that, at all other times when they went to town in company with the defendant, the plaintiff and her daughter and others were in the same conveyance.

In addition to what has already been quoted from the plaintiff's own testimony, concerning her affrays with her husband, she says he would make slighting remarks every time he came into the house. Her examination includes the following:

"Q. What did he say?

"A. I don't remember what he said in words. I talked to him about the same as he did to me. * *

"Q. When he talked to you in that way, you talked back to him in the same way?

“A. I would not answer him back lots of times; it hurt me so bad, I couldn’t. * *

“Q. Generally, you answered him in that same way, didn’t you?

“A. I did not understand, not always; I said I didn’t.”

She says, “I told him that he acted pretty fresh toward other women,” and she accused him of being too familiar with May Hajicek. The defendant says she had the habit of nagging him about other women, whom he mentions, and accusing him of being too familiar with them. She does not dispute, but rather corroborates, him on this point. Moreover, there is not a line of testimony showing any unchastity or impropriety on his part with any woman. He said he was always pleasant to her when she would talk to him, and that he provided well for her. She says herself, “He is pretty good for providing. I can say that about him, and he can have that much more.”

The testimony shows that the plaintiff’s hearing is impaired, that she was sensitive about this infirmity, and that it intensified her suspicions of other people because she could not always understand what was being said. This, together with her alleged nervous temperament, throws light upon her conduct toward her husband but does not justify it. As stated before, the only witnesses for the plaintiff, besides her physician, who speaks only of her physical condition, are plaintiff herself, her son-in-law, Schumacher, and Mrs. Lewis. Schumacher does not give any account whatever of any misconduct by the defendant toward the plaintiff. A *résumé* of the situation shows that the relations between them were becoming strained, and the remark made by the defendant to the son-in-law expressed no more than the wish that the affair was

ended. Mrs. Lewis speaks only of Mrs. Ream's affair with Standish.

The plaintiff cites, as authority for making the defendant responsible for her altercations with Standish and Blair, the case of *Hall v. Hall*, 9 Or. 452. There the parties had had an antenuptial agreement to the effect that if the plaintiff married the defendant the latter should provide for his two daughters elsewhere, and not keep them in their home. In spite of this, he not only refused to observe the agreement, but made no attempt to control his daughters in their insulting demeanor toward their stepmother. The court held that, because of his breach of the stipulation and his refusal to attempt to restrain them, he adopted their acts as his own. Here, the case is entirely different. The defendant remained in utter ignorance of the pistol incident with Blair until he read it in the complaint. He was not present at the quarrel with Standish, and knew nothing of it until some days afterward, when he reproved Standish and soon discharged him. According to the weight of the testimony, the only fault that the plaintiff could find with her husband, respecting the altercation with Blair at the breakfast-table, was that he did not affirmatively espouse her side of the quarrel in which she engaged with the hired man. We must remember that the plaintiff at this time, by the undisputed testimony, had for a long time refused to talk with the defendant, had treated him coolly, had given various evidences of her jealousy, without any foundation for the same, and even then had packed her things and was ready to leave him. Notwithstanding all this, the defendant cautioned Blair in advance against making any trouble and, as they both state, reproved him at the time and told him to keep quiet at the table. It

is noteworthy that the daughter of the plaintiff was present at the time, yet she is not called as a witness. The defendant is in no way responsible for or chargeable with the conduct of either Blair or Standish toward the plaintiff. He was not a party to it, did not countenance it, reproved both of them, and discharged Standish. As the plaintiff was even then prepared to leave, it was not necessary for the defendant to send Blair away, especially as the plaintiff had opened the quarrel with him.

Conceding that the two parties are of equal credibility, they differ so materially in their statements of the different altercations that it is plain the plaintiff has failed to make out her case by a preponderance of the testimony. All the disinterested witnesses who speak on the subject accord to the defendant kind treatment of his wife and impute to her jealousy and faultfinding. Even her own daughter, though a member of the family, at the times mentioned in the complaint, did not appear as a witness in support of the plaintiff's contention. In the plaintiff's own account of the row about moving the bed, she appears to have been a participant in a mutual affray. The defendant had bought the bed for their own personal use and had told her that he wanted it to stay in their room. He had fully as much right to use the bed he had purchased as she had, and it was in flagrant disregard of his legitimate wishes that she undertook to move it. When he protested, she engaged in combat with him and was simply vanquished. She is not blameless in that affair.

Again, in the occurrence of March 24th, he says that he was simply joking her. According to her own statement, she, at that time, was drawing unfavorable comparisons between him and the husband of the

neighbor woman. Likewise, in the wrangle of April 15th, when she says he threatened to slap her face, that was language used in a mutual quarrel in which she said to him that he had as much respect for her as he would have for an old nigger servant, etc. Again, in her sulks about moving the bedstead, she refused to occupy the same bed with him; made her pallet on the floor; later on, carried a cot into the room and occupied that until the hired girl left, when she moved into the room the girl vacated. Her conduct toward him in refusing to speak to him and contemptuously moving her plate away from him at the table indicate that she was quite as much to blame for the misunderstanding between her and the defendant as he was.

Our own precedents are not silent on this subject. In *Beckley v. Beckley*, 23 Or. 226 (31 Pac. 470), Mr. Justice MOORE says:

“It is not every threat uttered, while smarting under real or imaginary slights, or prompted by the pangs of jealous rage, nor overt acts of violence, even committed in the heat of passion caused by the aggravation of the other party, that constitutes cruelty. There must be an intention to worry the other, and this may be successfully accomplished without a single threat and in the absence of any act of violence. The studied sneer, the willful neglect or the careless disregard of the other's wishes may, and often does, endanger the health of the injured party. Cruelty is a question of intent—a mental purpose to wound the feelings of the other party.”

This language very properly characterizes the conduct of the plaintiff in her demeanor toward her husband, in her refusal to speak to him or to occupy the same bed with him, in her petty espionage upon him, in her nagging him about other women without any reasonable cause, and in making comparisons between

his conduct and that of other husbands to his detriment. Such conduct would be maddening to any man of spirit, and was doubtless designed for that purpose by the plaintiff. The conduct of the defendant is not to be approved; neither can we wonder at it; but fairness compels the observation that the demeanor of the plaintiff did much to provoke it. The case would be a close one and the issue narrow if we were called upon to determine which of the twain was the greatest offender against the peace of wedlock; but that is not the question to be decided. Our own former utterances declare a different principle. In the *Beckley Case* the opinion continues:

“To entitle one to a decree of divorce for cruel and inhuman treatment, the injured party must come into a court of equity free from the suspicion that he has contributed to the injury of which he complains. Divorces should not be granted by weighing the evidence and decreeing in favor of the one least guilty, where both have taken an active part in the mutual discord. Equity relieves the injured party, but not the vanquished. In the struggles for supremacy, or to vent spleen, spite or hatred, the willing actors may fight out the battles of wedded life, but they cannot invoke the aid of equity after their own efforts have failed.”

The same writer in *Jones v. Jones*, 44 Or. 586 (77 Pac. 134), held that, where the plaintiff was a willing and active participant in the quarrels and assaults of which she now complains, she is not entitled to a divorce. The following precedents are to the same effect: *Taylor v. Taylor*, 11 Or. 303 (8 Pac. 354); *Adams v. Adams*, 12 Or. 176 (6 Pac. 677); *Wheeler v. Wheeler*, 18 Or. 261 (24 Pac. 900); *Mendelson v. Mendelson*, 37 Or. 163 (61 Pac. 645); *Crim v. Crim*, 66 Or. 258 (134 Pac. 13); *Matlock v. Matlock*, 72 Or. 330 (143 Pac. 1010). In *Rowe v. Rowe*, 84 Kan. 696 (115 Pac. 553), the court says:

“Where words alone are relied on, it must appear that they were uttered, not merely as complaints against the misconduct of the other, real or apparent, but that they were uttered without justifiable cause and for the purpose of inflicting pain.”

Out of her own lips, plaintiff has given an account of conduct on her part that would exasperate any man and provoke the language of which she complains. Clearly, she is to blame, in her relations to her husband as stated in *Beckley v. Beckley*, 23 Or. 226 (31 Pac. 470). Her compilation of the book of transgressions is not indicative of a heart crushed and wounded nigh unto death; but, rather, it reveals a cold and calculating disposition, biding its time, and determined finally to maneuver its prey into the snare. We cannot apportion the wrong between two parties, both of whom are at fault. Not having come into court with clean hands, the plaintiff is not entitled to relief in chancery. In view of the shortcomings of the plaintiff, the amercement of the defendant to the extent of one third of his realty would be inflicting a penalty out of all proportion to the *quantum* of his offending. To grant her a divorce according to the prayer of her complaint would be practically to confiscate the defendant's property, and thus capitalize her for another matrimonial venture, in which she could open a new set of books regarding her marital grievances with a view of increased pecuniary gains in future divorce litigation.

The decree of the Circuit Court should be reversed and the suit dismissed.

Argued on demurrer June 17, demurrer sustained July 14, 1916.

PATTON v. WITHYCOMBE.*

(159 Pac. 78.)

Statutes—Initiative Statutes—Legislative Repeal.

1. The Constitution does not deny to the legislature the right to amend or repeal a statute enacted by the people in the exercise of the initiative.

[As to self-executing provisions of Constitution, see note in Ann. Cas. 1914C, 1116.]

Statutes—Repeal—Constitutional Requirements.

2. Even though an independent act, complete within itself, works a repeal by implication, the repealing statute is not pregnable for failure to observe Article IV, Section 22, of the Constitution, declaring that no act shall be revised or amended by mere reference to its title, but the act amended shall be set forth at full length.

Elections—Primaries—Filing for Nomination—Statutes—Validity.

3. Although Laws of 1913, page 183, forbids nomination of candidates for public office by political parties except as provided by Sections 3349–3391, L. O. L., inclusive, as to direct primaries the legislature, by Laws of 1915, page 124, provided an additional method of nomination by filing and payment of fees which is valid in view of the facts that the legislature may amend an initiated statute, and that there is no conflict.

Constitutional Law—Elections—Nominations—Free and Equal Elections—Privileges and Immunities.

4. Laws of 1915, page 124, providing for nominations for primary election by payment of fee, as a method additional to that of Laws of 1913, page 183, providing for nominations without fee on petition, is not invalid as violating Article II, Section 1, of the Constitution, requiring all elections to be free and equal, or Article I, Section 20, prohibiting privilege or immunity legislation, since no distinction is made on the ballot, and the candidate may elect the method he will follow.

Original proceeding in Supreme Court.

In Banc. Statement by MR. JUSTICE HARRIS.

Upon the petition of H. M. Patton an alternative writ of *mandamus* was issued by this court, directing

*As to the constitutionality of the primary election law, generally, see notes in 22 L. R. A. (N. S.) 1136; 41 L. R. A. (N. S.) 132. And for authorities passing on the question of validity of fee exacted for filing nominations, see note in L. R. A. 1915B, 197. REPORTER.

James Withycombe, as Governor of Oregon, to refrain from issuing a proclamation, declaring that Gus C. Moser, A. W. Orton, Conrad P. Olson, S. B. Huston and Robert S. Farrell were nominated at the primary election as the Republican candidates for the five offices of state senator for the thirteenth senatorial district, and to refrain from issuing certificates of nomination to any of those persons, and that the Governor proclaim that the petitioner was nominated, and issue him a certificate of nomination, or show cause for not doing so.

The defendant filed a demurrer, and consequently the questions for discussion arise out of the allegations found in the writ. A general primary nominating election was held throughout the state on May 19, 1916, for the nomination of candidates for different offices, including five senatorships for the thirteenth senatorial district, which comprises Multnomah County only. Complying with the direct primary nominating elections law, H. M. Patton filed a petition with the Secretary of State as a candidate for the Republican nomination for the office of state senator in the thirteenth senatorial district. Gus C. Moser, A. W. Orton, Conrad P. Olson, S. B. Huston and Robert S. Farrell each filed a declaration of candidacy for the Republican nomination for the office of state senator for the thirteenth senatorial district with the Secretary of State, and paid the fees prescribed by Chapter 124, Laws of 1915. The name of the petitioner, as well as the names of the other five persons, were printed as candidates for the Republican senatorial nominations on all of the official primary nominating ballots which were submitted to and used by the voters of the Republican party in Multnomah County. A canvass of the votes cast at the primary election showed that

Moser, Orton, Olson, Huston and Farrell each received more votes than Patton. It is alleged, however, that the five persons mentioned were not lawful candidates, for the reason that the act of 1915 is void, that Patton received more votes than any other lawful candidate, and that therefore he is entitled to a certificate of nomination.

DEMURRER SUSTAINED.

For petitioner there was an oral argument by *Mr. Wilson T. Hume*.

For Governor Withycombe there was an oral argument by *Mr. George M. Brown*, Attorney General.

There was an oral argument by *Mr. F. W. Mulkey*, *amicus curiae*.

MR. JUSTICE HARRIS delivered the opinion of the court.

The argument of the petitioner proceeds upon the theory that the legislative act of 1915 is unconstitutional because it requires the payment of a fee, that all persons who followed that statute were unlawful candidates; and that therefore all votes cast for those persons were deposited for unlawful candidates, and should not be counted. The petitioner announced his candidacy in compliance with the provisions of the direct primary nominating elections law, which was adopted by the people in the exercise of the sovereign right of initiative at the general election held on June 6, 1904 (Chapter 1, Laws 1905; Sections 3349-3391, 2 L. O. L., inclusive), but the other five persons filed their declarations of candidacy in the manner prescribed by the legislative act found in Chapter 124, Laws of 1915. The direct primary nominating elec-

tions law permits a person to become a candidate for a party nomination by filing a petition signed by a specified number of voters belonging to that party, but no fee is required to be paid by the candidate. If the petition is signed by the required number of voters, it must be filed without the payment of any fee, and the name of the candidate must be printed on the official ballot. The legislative act of 1915 provides that:

“Any registered elector may become a candidate for his or her party’s nomination for any office to which he or she is constitutionally eligible * * in addition to the method now provided by law, by filing declaration of his or her candidacy, as herein provided and accompanying said declaration with the required filing fee.”

The fees are fixed at \$150 for United States senator; \$100 for offices to be voted for in the state at large, except national committeemen, delegates to national party conventions and presidential electors; \$100 for representatives in Congress; \$50 for certain district offices; \$20 for county offices, except district offices within the county; \$10 for senator and representative in the legislature; \$15 for national committeemen, delegates to national party conventions and presidential electors; and \$5 for district offices within the county. Upon the filing of the declaration and the payment of the required fee, “said candidacy shall be deemed complete,” and the name of such candidate is then “printed upon the official ballot at the ensuing primary election, and no additional signatures or fees shall be required to make said candidacy complete and effective.”

1-3. While the Constitution does not deny to the legislature the right to amend or repeal a statute enacted by the people in the exercise of the initiative (*Straw v. Harris*, 54 Or. 424, 431 (103 Pac. 777), yet it is plain that the legislative act of 1915 was not de-

signed to amend, revise or repeal the initiative statute of 1904, and consequently the second act was not passed in violation of Article IV, Section 22, of the state Constitution, which declares that:

“No act shall ever be revised or amended by mere reference to its title, but the act revised or section amended shall be set forth and published at full length”: *Sheridan v. City of Salem*, 14 Or. 328, 337 (12 Pac. 925); *State v. Rogers*, 22 Or. 348, 365 (30 Pac. 74).

Even though an independent act, complete within itself, works a repeal by implication, the repealing statute is not pregnable on account of a failure to observe Article IV, Section 22: *Warren v. Crosby*, 24 Or. 558, 563 (34 Pac. 661); *Northern Counties Trust v. Sears*, 30 Or. 388, 399 (41 Pac. 931, 35 L. R. A. 188). The second statute employs the most positive language in expressing its purpose. The title introduces the act by declaring that it is “an additional method, whereby electors may become candidates for party nominations.” Section 1 provides that an elector may become a candidate for a party nomination “in addition to the method now provided by law * * as herein provided.” The final section directs that:

“In case any candidate for office shall elect to become a candidate under the provisions of Section 3361 of Lord’s Oregon Laws, he shall be required to file the following declaration.”

Section 3361 relates to the form of the petition to be circulated and filed when following the provisions of the statute of 1904. It is true that the title of the initiative act asserts that one of its purposes is to forbid “the nomination of candidates for public office by such political parties in any other manner,” and Section 11, being Section 3359, L. O. L., amended by Chap-

ter 108, Laws of 1913, affirms that every political party embraced by the primary law "shall nominate all its candidates for public office, under the provisions of this law and not in any other manner"; but since there is no constitutional obstacle to prevent the legislature from providing for another method, the language last quoted from the 1904 statute offers no impediment to subsequent legislation, whether by the people or the legislative assembly, and consequently the force of the words found in the 1904 legislation, declaring that there shall be no other method of nominating candidates, is reduced and weakened to the extent that an additional method is provided by a subsequent statute. The act of 1915 is a complete and independent statute, which declares that its purpose is to afford another method, in addition to the one already provided, for becoming a candidate for a party nomination. The elector is not obliged to follow both methods, but he has the option of choosing either one or the other. He has the privilege of filing a petition, signed by a certain number of voters, without the payment of any money, or, if he chooses, he may become a candidate by merely filing a declaration and paying the specified fee. The petitioner exercised his option by filing a petition, and no fee was required from him, while the other candidates merely filed declarations and paid the fees required by the act of 1915.

4. The petitioner contends that the legislative act of 1915 is void because it violates Article II, Section 1, which commands that "all elections shall be free and equal," and for the reason that it infringes upon Article I, Section 20, of the state Constitution, guaranteeing that:

"No law shall be passed granting to any citizen or class of citizens, privileges or immunities which, upon the same terms, shall not equally belong to all citizens."

The adjudications dealing with statutes which exact the payment of fees by candidates for party nominations may be divided into three classes. The language found in *Johnson v. Grand Forks County*, 16 N. D. 363 (113 N. W. 1071, 125 Am. St. Rep. 662), warrants its citation as an authority for the doctrine that no fee, whether nominal or otherwise, can be exacted. The second class of cases embraces those which deny the right to charge any fee in excess of a nominal sum, and yet from the reasoning employed seem to authorize the payment of a nominal sum: *People v. Election Commrs.*, 221 Ill. 9 (77 N. E. 321, 5 Ann. Cas. 562); *Ballinger v. McLaughlin*, 22 S. D. 206 (116 N. W. 70); *State v. Drexel*, 74 Neb. 776 (105 N. W. 174); *Ledgerwood v. Pitts*, 122 Tenn. 570 (125 S. W. 1036). The remaining class includes all those precedents for the doctrine that a reasonable fee may be collected, as in *Riter v. Douglass*, 32 Nev. 437 (109 Pac. 444); *State v. Brodigan*, 37 Nev. 492 (143 Pac. 238, L. R. A. 1915B, 197); *Socialist Party v. Uhl*, 155 Cal. 776 (103 Pac. 181); *State ex rel. v. Nichols*, 50 Wash. 508 (97 Pac. 728); *State v. Scott*, 99 Minn. 145 (108 N. W. 828); *Kenneweg v. Alleghany County*, 102 Md. 119 (62 Atl. 249). The contrariety of judicial opinion is illustrated by *State v. Drexel*, holding that a fee of one per centum of the emoluments of the office was unconstitutional, and by *State ex rel. v. Nichols*, where the court sustained a fee of one per centum of the salary attached to the office. The first and second classes of cases proceed upon the theory that the Constitution fixes the qualifications for an elector, and that the legislature cannot, by a mere statute, add as a qualification for the right to be a candidate for a party nomination the payment of a fee, especially if it exceeds a nominal sum. The adjudications embraced by the

third class are founded upon the principle that the payment of a fee is only a regulatory measure, and so long as the amount is reasonable, no valid objection is available.

The successful candidates gained no advantage over Patton when they filed their declarations under the act of 1915, because their names were printed on the same ballot and exactly as they would have appeared if they had filed petitions as the petitioner did. There is nothing on the printed ballot to indicate the method selected by the candidate, but his name is printed on the ballot, which is submitted to the voter, in the same place, manner and form, whether a petition is filed under the 1904 act or a declaration is made pursuant to the statute of 1915. It is argued, however, that the second statute enables a rich person to become a candidate when perhaps the electors might be unwilling to sign a petition; but this argument fails when viewed in the light of local history, for it is common knowledge that no person has failed to secure a sufficient number of signatures on account of any unwillingness of electors to sign his petition. It is true that all voters will not sign all petitions, but it is also true that electors will usually sign a petition, when requested, to enable the petitioner to become a candidate. The act of 1915 does not, in any way, add to the qualifications of an elector who desires to become a candidate. No person is obliged to pay a fee, for the method requiring a fee is optional. The elector may create the right to become a candidate, either by a mere declaration and the payment of a fee, or by a petition without a fee, and a statute requiring the payment of a reasonable fee places no obstacle or impediment in the way of a person whether he be rich or poor, so long as another method like the one here requiring no fee is open

to him, especially when the name of the candidate is printed on the ballot without regard to the method selected. The existence and availability of one concededly valid method destroys the reason assigned in support of the asserted objection to the second and additional method, and when the reason fails, the objection ought to fail with it. It is not necessary to determine what the effect of the 1915 statute would be if it stood alone. The required fees are not unreasonable in amount, and the demurrer to the alternative writ is sustained.

DEMURRER SUSTAINED.

MR. CHIEF JUSTICE MOORE, MR. JUSTICE BURNETT and MR. JUSTICE EAKIN not sitting.

Argued on motion to vacate restraining order February 27, denied March 3, 1914.

COOPEY v. KEADY.*

(139 Pac. 108.)

Appeal and Error—Restraining Order—Vacation.

1. In a suit for accounting for commission for the sale of real estate, earned by plaintiff and defendants, and received by defendants, where the trial court granted a restraining order against the transfer of corporate stock received by defendants as a part of the commission, which order was dissolved on the rendition of a decree for defendants, and on appeal a justice of the Supreme Court reinstated the order, such order will not be vacated before final hearing, though plaintiff's right to relief on the merits be doubtful, where the continuance of the order will not cause defendants any great inconvenience, and plaintiff has given an undertaking to pay damages sustained by defendants by reason of the injunction, if it be wrongful, or without sufficient cause.

Injunction—Restraining Order—Discretion of Court.

2. The granting or refusal of restraining orders rests in the sound discretion of the court; but this discretion is not an arbitrary one, and it must be exercised in accordance with the principles of equity and good conscience.

*This opinion should have been published in 73 Or., at page 66, along with the final decision of the case on its merits. REPORTER.

From Multnomah: GEORGE N. DAVIS, Judge.

Department 2. Statement by MR. JUSTICE RAMSEY.

This is a suit by Charles Coopey against L. Y. Keady, A. F. Swensson, the Pacific Realty Company, a corporation, W. J. Burns, and the L. Y. Keady Investment. From a decree for defendants, plaintiff appeals. Defendants file a motion to vacate a temporary restraining order granted by a justice of this court pending the appeal. The facts appear in the opinion of the court. MOTION DENIED.

Messrs. Griffith, Leiter & Allen and Messrs. Veazie, McCourt & Veazie, for the motion.

Mr. W. Y. Masters and Messrs. Sinnott & Adams, contra.

MR. JUSTICE RAMSEY delivered the opinion of the court.

The plaintiff, Charles Coopey, brought a suit in equity for an accounting with the defendants L. Y. Keady and A. F. Swensson concerning commissions amounting to \$150,000, which the plaintiff claims were due him and said defendants for making a sale of certain lands in Multnomah County for the Oregon Real Estate Company. Said real property was owned by said company, and it was sold for about \$2,225,000.

The plaintiff claims that he and said defendants, as real estate agents, sold said premises, and that the defendants Keady and Swensson received all of the commissions therefor, and that he is entitled to one-third thereof. The plaintiff, in his affidavit, testifies that the defendants Keady and Swensson received a portion of said commissions in the capital stock of the Anglo-Pacific Realty Company, and that they had of

said stock in their possession, when this suit was commenced, more than \$50,000.

It is admitted by said defendants that they were associated with the plaintiff for a time in an effort to sell said real property; but they claim that their relations with him ceased some time before said sale was made, and that, when said sale was made, the plaintiff had nothing to do with making it, and had no interest therein. They claim, also, that he was not entitled to receive any part of said commissions. They admit, we believe, that the commissions by them received for making said sale amounted to \$150,000. The defendants contend, also, that the plaintiff, some time before said sale was made, executed a paper which operated as a release of all of the plaintiff's rights growing out of efforts to sell said land, and that he did nothing in aid of the sale of said premises after the execution of said paper. On the other hand, the plaintiff contends that said supposed release did not bar or affect his right to one third of said commission.

1. There appears to be no doubt that said defendants received as commission on said sale \$150,000, and that the plaintiff was, for a time, associated with them in efforts to sell said premises; but as to whether he was associated with them when the sale was made, or as to whether he is entitled to receive a part of said commission, there is a sharp conflict between the showing made by the plaintiff and that made by the defendants. In passing on this motion to vacate said restraining order, we cannot determine the questions at issue between the parties on the merits.

In the court below a preliminary injunction was issued, restraining the defendants from selling or transferring said \$50,000 of the capital stock referred to *supra*. The defendants applied to the court below for

an order vacating said injunction order; but the trial court denied said motion. However, on the final hearing, the court below rendered a decree in favor of the defendants, and this decree vacated the preliminary injunction.

The plaintiff appealed to this court, and thereafter applied to a justice of this court for an order reinstating said injunction order, restraining the defendants from disposing of said stock pending the appeal. The order was granted, and this motion was made for a vacation of said order. It was held, in *Livesley v. Krebs Hop Co.*, 57 Or. 352 (97 Pac. 718, 107 Pac. 460, 112 Pac. 1), that this court had jurisdiction to grant a restraining order in cases pending on appeal. We do not therefore deem it necessary to re-examine that question. We will follow the decision in that case.

As the record shows, the court below, on a motion to vacate the restraining order, refused to do so, and a justice of this court has reinstated that order, pending the appeal. We are now asked to vacate the restraining order granted by a justice of this court.

Courts should always exercise caution in granting restraining orders, and justices of this court should act with great caution in allowing such orders.

In the case of *Chegary v. Scofield*, 5 N. J. Eq. 531, the court says:

“We can do nothing but review the particular order or decree appealed from, except that, * * where the chancellor, by his decree, has loosened a man’s hands, we may, by a preliminary order, tie them up again, until we can hear the appeal, and determine whether he ought to be let loose or not.”

In *Helm v. Gilroy*, 20 Or. 520 (26 Pac. 852), the court says:

“In granting or refusing temporary relief by preliminary injunction, *courts of equity should in no man-*

*ner anticipate the ultimate determination of the question of right involved. They should merely recognize that a sufficient case has or has not been made out to warrant the preservation of the property or rights in status quo until a hearing upon the merits, without expressing a final opinion as to such rights. * * The granting or refusing of such an injunction rests largely within the discretion of the court," etc.*

In 10 Ency. Pl. & Pr. 1010, the author says:

"It is not proper, on an application for a preliminary injunction, to decide or to consider, with a view of final decision, the merits of the controversy, especially when grave questions are involved, and the court should do no more than determine that the bill, assuming its allegations to be true, sets forth facts sufficient to warrant the issuance of an injunction."

In 22 Cyc. 751, the author says:

"It is not sufficient ground for refusing a preliminary injunction that it is not absolutely certain that complainant has the right that he claims, or that the injury feared will occur, and, even though complainant's right to permanent relief is doubtful, it may be proper to maintain the status quo pending the determination of his right; the issuance of a temporary injunction in such cases depending chiefly upon the relative inconvenience to be caused the parties."

In 1 Joyce on Injunctions, Section 25, the author says, *inter alia*:

"When the rights of the parties are at all doubtful, the court applied to for an injunction should look at the balance of inconvenience, and act upon the consideration of the comparative inconvenience which may arise from granting or withholding the injunction."

In *Harriman v. Northern Securities Co.* (C. C.), 132 Fed. 476, the court says:

"Where, however, the sole object for which an injunction is sought is the preservation of a fund in con-

troversy, or the maintenance of the *status quo*, until the question of right between the parties can be decided on final hearing, the injunction properly may be allowed, although there may be serious doubt of the ultimate success of the complainant. Its allowance in the later case is a provisional measure, of suspensive effect, and in aid of such relief, if any, as may finally be decreed to the complainant."

In *Glascott v. Lang*, 3 Mylne & C. 451, 455, Lord Chancellor COTTENHAM says:

"In looking through the pleadings and the evidence for the purpose of an injunction, *it is not necessary that the court should find a case which would entitle the plaintiff to relief at all events*. It is quite sufficient if the court finds, upon the pleadings, and upon the evidence, a case which makes the transaction a proper subject of investigation in a court of equity."

In *Russell v. Farley*, 105 U. S. 438 (26 L. Ed. 1060), the court says:

"It is a settled rule of the court of chancery, in acting on applications for injunctions, to regard the comparative injury which would be sustained by the defendant, if an injunction were granted, and by the complainant, if it were refused. * * And if the legal right is doubtful, either in point of law or of fact, the court is always reluctant to take a course which may result in material injury to either party."

The injunction in this case restrains the defendants from transferring or disposing of a block of corporate stock held by them in which the plaintiff claims to have an equitable right or interest. While the plaintiff's right to relief may be doubtful, we cannot pass on that right finally on this motion.

We are unable to see that permitting the restraining order to stand until the final hearing would be of any great inconvenience to the defendants. The injunction order will not prevent the stock-earning divi-

dends, and the plaintiff has given an undertaking, with a competent surety, for the payment of damages sustained by the defendants, by reason of the injunction, if it be wrongful or without sufficient cause. It is not necessary that the plaintiff's right to relief be free from doubt to entitle him to a temporary restraining order.

2. The granting or refusal of restraining orders rests in the sound discretion of the court; but this discretion is not an arbitrary one, and it must be exercised in accordance with the principles of equity and good conscience.

In 1 Joyce on Injunctions, Section 118, the author says:

“The granting of an injunction is a matter of grace in no sense, except that it rests in the sound discretion of the court, and that discretion is not an arbitrary one. Such discretion will often be influenced by a consideration of the relative injury and convenience likely to result to the parties from granting or refusing the injunction,” etc.

Section 421, L. O. L., *inter alia*, provides:

“If, upon the hearing of the motion [to vacate the injunction], it satisfactorily appears that the injunction should not have been allowed, either in whole or in part, it shall be vacated or modified accordingly.”

Considering the relative convenience and injury which might result to the parties from the granting or the refusal to grant the motion to vacate the restraining order, we find that the justice of this court, who granted the order reinstating the preliminary injunction, did not abuse the discretion vested in him, and that said motion should be denied.

The motion to vacate the temporary injunction is denied, and said order will be permitted to stand until

the final determination of this case on its merits, or until the further order of this court.

MOTION DENIED.

MR. CHIEF JUSTICE McBRIDE, MR. JUSTICE EAKIN and MR. JUSTICE McNABY concur.

Argued June 29, affirmed July 18, 1916.

KONDO v. AYLSWORTH.

(158 Pac. 946.)

Sales—Executory Contracts—Effect.

1. A contract to purchase a number of cords of wood on cars or at station, at various prices, which fails to state the time of payment or delivery, is an executory contract under which title does not pass until delivery, and the purchaser could have action only for breach of contract, and not in replevin.

Trover and Conversion—Acts of Conversion—What Constitutes.

2. It is no conversion for the purchaser under executory contract of wood, to be delivered at a station, to take such wood as is placed there by the seller, in the absence of notice not to remove it.

[As to conversion of personal property sufficient to sustain action of trover, see note in 24 Am. St. Rep. 795.]

Setoff and Counterclaim—When Maintainable—Tort and Contract.

3. In an action in tort, a counterclaim arising *ex contractu* cannot be maintained.

From Multnomah: HENRY E. MCGINN, Judge.

Department 1. Statement by MR. JUSTICE McBRIDE.

This is an action in trover by T. Kondo and K. Kureye against Charles R. Aylsworth and Frank C. Espenhain, partners under the name of Sunnyside Fuel Company, for the taking and conversion of 71 cords of wood of the alleged value of \$284.

Defendants answered by general denial, and by way of counterclaim alleged that on May 10, 1913, plain-

tiffs sold and promised and agreed to deliver to defendants on the railroad track at Anderson Station a quantity of wood consisting of 1,000 cords, situated near said station, for the sum of \$3.25 a cord for No. 1 wood and \$2.75 a cord for No. 2 wood, and that the wood mentioned in plaintiffs' complaint was a portion of the wood so sold to defendants; that between May 10 and June 24, 1913, plaintiffs delivered to defendants 62 cords of said wood, and on the ninth day of September, 1913, they delivered 71 cords, as a part of the total quantity sold to defendants, and that between the fourteenth day of May and the fifteenth day of June, 1913, defendants paid to plaintiffs the sum of \$195.50 to apply on the purchase price of said 1,000 cords; that on or about the — day of September, 1913, plaintiffs repudiated said sale and refused to deliver the remaining portion of said wood so sold to defendants. Then follow allegations of special damage in the sum of \$600 by reason of the alleged failure of defendants to deliver the wood, an allegation that the value of the wood delivered and unpaid for is \$240.75, and a prayer for judgment against plaintiffs for \$359.25.

The answer being put in issue by appropriate denials of the new matter, there was a jury trial, and verdict for plaintiffs for \$255.20, with interest from September 5, 1913, and a judgment accordingly, from which judgment defendants appeal, alleging as error the giving of certain instructions excepted to and the refusal of the court to give certain instructions requested.

AFFIRMED.

For appellants there was a brief over the name of *Messrs. Kimball & Ringo*, with an oral argument by *Mr. Ernest R. Ringo*.

For respondents there was a brief over the name of *Messrs. Flegel, Reynolds & Flegel*, with an oral argument by *Mr. John W. Reynolds*.

MR. JUSTICE McBRIDE delivered the opinion of the court.

1, 2. Before considering the errors alleged it seems proper to consider the nature of the alleged contract. It is claimed by the defendants in their testimony that on the tenth day of May, 1913, they entered into an agreement with plaintiffs to purchase the entire 1,000 cords of wood lying in the woods near Anderson Station, and agreed to pay therefor when delivered on board the cars or piled near the track the sum of \$2.75 and \$3.25 per cord. When the payments were to be made or in what quantities or at what times the wood was to be delivered does not appear. This is clearly an executory contract, and no title passed to any wood until it was delivered. If it had burned in the woods, the loss would have fallen on the plaintiffs. In case of a failure or refusal to deliver, defendants would have had an action against plaintiffs for breach of the contract, but no action of replevin to recover the wood, because the labor of hauling and piling near the station or placing on the cars were as much a part of the consideration for the price to be paid as the wood itself. So it may be premised that the defendants did not own any part of this 1,000 cords which they claim to have purchased, except such as had been put on board the cars or had been piled alongside of the track with the intent to deliver it to them. If the contract was entered into and the 71 cords which defendants took was part of this wood, defendants, in the absence of notice to the contrary, had a right to assume that it was piled there in pursuance of the contract, and

were not guilty of wrongful taking and conversion by hauling it away; and the court so instructed the jury, saying among other things:

“If you find that the wood was delivered there under an agreement to sell and deliver 1,000 cords of wood, and the defendants took the wood, they in that event had the right to take it, and they may defend upon the ground that it was a delivery of a part of the 1,000 cords, and there was no conversion whatever in the case.”

This was, in substance, the same instruction upon that subject that was requested by defendants, which was as follows:

“If you find from the evidence that the plaintiffs entered into a verbal contract with the defendants, by which the plaintiffs were to deliver at Anderson Station for defendants a quantity of wood, and that in fulfillment of that contract the wood, or any portion thereof, was delivered to defendants at Anderson Station, then I instruct you that the taking by the defendants of such wood so delivered would not be unlawful, and there was no conversion of the plaintiffs' property by the defendants, and your verdict should be for the defendants.”

3. The second requested instruction was properly refused. The action was in tort, and the authorities agree that a counterclaim arising out of contract cannot be maintained under such circumstances. This was so held in *Loewenberg v. Rosenthal*, 18 Or. 178 (22 Pac. 601), and followed in *Krausse v. Greenfield*, 61 Or. 502 (123 Pac. 392, Ann. Cas. 1914B, 115). See, also, *Scheunert v. Kaehler*, 23 Wis. 523, a case very similar to the one at bar, and *People v. Dennison*, 84 N. Y. 272, 280. The latter case also holds that the objection to the sufficiency of the counterclaim is not waived by failure to demur to the answer. In the present case this position becomes still stronger from the fact that,

while the matter pleaded as a counterclaim was not good as such, it constituted a valid defensive answer, and was so treated by the court. There was left in the case just one question to be tried, namely, whether the contract alleged by the defendant was actually made. This was properly submitted to the jury by the instruction above quoted, and by its verdict for the plaintiff it necessarily found that no contract existed.

Taking the instructions as a whole, they fairly presented the law, and were quite as favorable to the defendants as the pleadings and proof warranted.

The judgment is affirmed.

AFFIRMED.

MR. CHIEF JUSTICE MOORE, MR. JUSTICE BURNETT and MR. JUSTICE BENSON concur.

Argued June 15, reversed July 18, 1916.

CHANCE v. CARTER.

(158 Pac. 947.)

Dismissal and Nonsuit—Plaintiff's Right—Counterclaim.

1. Under Section 182, L. O. L., as to nonsuits, plaintiff has an absolute right at any time before trial to a voluntary nonsuit unless a counterclaim has been pleaded as a defense.

Setoff and Counterclaim—What Constitutes—"Counterclaim."

2. The distinction between actions at law and suits in equity has not been abrogated, so that to constitute a counterclaim in a law action it is not enough that defendant's claim be merely "connected with the subject of the action."

Ejectment—Actions—Questions Involved.

3. The action of ejectment involves both the right of possession and the right of property.

[As to the property or invasion of possession for which ejectment is maintainable, see note in 116 Am. St. Rep. 568.]

Ejectment—Setoff and "Counterclaim"—"Transaction."

4. Section 73, L. O. L., requires the answer to contain denials and any new matter constituting a counterclaim. Section 74 requires a

counterclaim to be in favor of defendant against plaintiff, between whom a several judgment might be had in the action, and to arise out of a cause on contract, or transaction, set forth in the complaint as the foundation of plaintiff's claim, or, in actions on contract, any other cause on contract existing on commencement of the action. *Held* that, while the word "transaction" means more than "contract," and includes a business or other affair between the parties, yet, where plaintiff in ejectment merely alleged ownership and defendant's unlawful occupancy, defendant's answer merely claiming title was not a counterclaim, since neither revealed the transaction involved as the basis of plaintiff's claim.

Ejectment—Setoff and "Counterclaim"—What Constitutes.

5. In ejectment, where defendant answers under Section 328, L. O. L., claiming to be the absolute owner and denying plaintiff's interest, the answer is applicable only to one action, and is in no sense a counterclaim, although it permits defendant to secure affirmative relief.

Pleading—Setoff and Counterclaim—Requisites.

6. A counterclaim must be complete in itself, and show that defendant could recover if he first sued for that purpose.

From Yamhill: HARRY H. BELT, Judge.

In Banc. Statement by MR. JUSTICE HARRIS.

This is an action of ejectment by Martha A. Chance against C. C. Carter.

The body of the complaint, omitting the description of the land, is here set forth in full:

"That the said plaintiff is the owner in fee simple of the [land described]; that the said plaintiff is entitled to the possession of the said described real property and the whole thereof; that the said defendant wrongfully withholds the possession of the said described real property from the said plaintiff to her damage."

After denying the alleged ownership of plaintiff and traversing her claim of right to the possession, the answer avers that:

"The defendant is the owner in fee simple of the real premises * * and in possession thereof rightfully, and is entitled to such possession; * * that the said defendant and his predecessors in interest * * have been in * * adverse possession of the said real prem-

ises * * for more than ten years last past, prior to the commencement of this action"; and that "the plaintiff," her ancestor, predecessor, or grantor, was not seised or possessed of the real premises * * within ten years immediately prior to the commencement of this action."

And then the answer concludes with a demand for judgment "that he is the owner in fee simple and entitled to the possession of the real premises." The affirmative portions of the answer were traversed by a reply.

The court fixed May 10, 1915, as the time for the trial of the cause. The plaintiff mailed to the clerk of the court a written motion for a voluntary nonsuit, and on May 10, 1915, but before attempting to commence the trial, the court denied the motion and made an order which in part recites that:

"On this day, this cause coming on to be heard upon the plaintiff's motion for a judgment of nonsuit, the defendant herein appearing by his attorneys, and the plaintiff, although being duly called, comes not, but makes default and the cause being at issue upon the question of fact and the defendant herein having pleaded a counterclaim to the plaintiff's complaint, claiming and alleging that he is the owner in fee simple of the real premises described in the complaint. * * "

Although the plaintiff was not present, a jury was nevertheless impaneled, and after the defendant submitted his evidence and the court delivered his instructions the jury reached a verdict finding that the defendant owned the land and was entitled to its possession. The plaintiff appealed from the judgment which was entered on the verdict. REVERSED.

For appellant there was a brief and an oral argument by *Mr. George W. Gearhart*.

For respondent there was a brief over the name of *Messrs. McCain, Vinton & Burdett*, with oral arguments by *Mr. W. T. Vinton* and *Mr. James E. Burdett*.

MR. JUSTICE HARRIS delivered the opinion of the court.

1. The plaintiff argues that she had an absolute right voluntarily to dismiss the action, and that by force of the statute the court was obliged to allow the motion. The validity of the order denying the motion for a voluntary nonsuit depends upon whether the answer in the action of ejectment presents a counterclaim within the meaning of Section 182, L. O. L., which provides that:

“A judgment of nonsuit may be given against the plaintiff as provided in this chapter:

“1. On motion of the plaintiff, at any time before trial, unless a counterclaim has been pleaded as a defense.”

Precedents have firmly established the rule that in an action at law the plaintiff possesses the absolute right to a voluntary nonsuit at any time before trial “unless a counterclaim has been pleaded as a defense” (*Currie v. Southern Pacific Co.*, 23 Or. 400, 402 (31 Pac. 964); *Hume v. Woodruff*, 26 Or. 373, 375 (38 Pac. 191); *Ferguson v. Ingle*, 38 Or. 43, 45 (62 Pac. 760); *Hutchings v. Royal Bakery*, 60 Or. 48, 50 (118 Pac. 185); and therefore the court was powerless to deny the motion if the answer did not plead a counterclaim.

2-4. Ascertainment of the scope and meaning of the term “counterclaim,” used in Section 182, L. O. L., will solve the question presented by this appeal, and we can discover the meaning of the word by turning to Sections 73 and 74, L. O. L., because those provisions

of the Code specify what may be pleaded as a counterclaim in an action at law. Section 73 provides that:

“The answer of the defendant shall contain: 1. A general or specific denial of each material allegation of the complaint controverted by the defendant. * * 2. A statement of any new matter constituting a defense or counterclaim.”

Section 74, L. O. L., originally read thus:

“The counterclaim mentioned in Section 73 must be one existing in favor of a defendant, and against a plaintiff, between whom a several judgment might be had in the action, and arising out of one of the following causes of action:

“1. A cause of action arising out of the contract, or transaction set forth in the complaint, as the foundation of the plaintiff's claim.

“2. In an action arising on contract, any other cause of action arising also on contract, and existing at the commencement of the action.

“The defendant may set forth by answer as many defenses and counterclaims as he may have. They shall each be separately stated, and refer to the causes of action which they are intended to answer, in such manner that they may be intelligibly distinguished.”

This section was amended by Chapter 173, Laws of 1913, by adding the words:

“Provided, that the defendant shall not be required to admit in his answer any liability or indebtedness to the plaintiff in order to be permitted to plead a counterclaim.”

And a second amendment was made by Chapter 8, Laws of 1915, enabling a defendant to set forth by answer as many counterclaims as he may have, “including pleas in abatement.” However, all that part of Section 74 which is material to this discussion has remained unchanged from the time of its adoption in 1862. We must remember, too, that Section 74 does

not contain the words "or connected with the subject of the action" found in the Codes of many other states (*Krausse v. Greenfield*, 61 Or. 502 (123 Pac. 392, Ann. Cas. 1914B, 115); 34 Cyc. 660; Pomeroy, Code Rem. (4 ed.), § 602), although in a suit in equity a counterclaim may be pleaded "if it be connected with the subject of the suit" (Section 401, L. O. L.; *Le Clare v. Thibault*, 41 Or. 601, 605 (69 Pac. 552)). In this state the distinction between actions at law and suits in equity has not been abrogated; and it is not sufficient to create a counterclaim in an action at law if the claim of the defendant "be only connected with the subject of the action": *Krausse v. Greenfield*, 61 Or. 502, 506 (123 Pac. 392, Ann. Cas. 1914B, 115). Furthermore, as stated in *Cohn v. Wemme*, 47 Or. 146, 150 (81 Pac. 981, 8 Ann. Cas. 508):

"We have no statute authorizing an equitable defense to be interposed to an action at law, and, though in this state a court of equity and a court of law are presided over by the same judge, they are essentially different forums": *Chauncey v. Wollenberg*, 59 Or. 214, 224 (115 Pac. 419); *Burrage v. Bonanza G. & Q. M. Co.*, 12 Or. 169, 173 (6 Pac. 766).

We must therefore eliminate from our consideration all those reported decisions which are predicated upon statutes containing the words "or connected with the subject of the action," and also all juridical expressions found in jurisdictions where both legal and equitable rights may be asserted and established in a single proceeding which is usually termed an action.

Having noted that a suit in equity as distinguished from an action at law must be resorted to for the enforcement and establishment of an equitable right, and having observed that our statute which provides for counterclaims in an action at law is narrower than

the provisions usually found in the Codes of other states, attention can now be directed to the language of Section 74, L. O. L. When applied to an action at law, and the instant proceeding is an action at law, the statute declares in plain and unequivocal terms that the counterclaim must in any event be one existing in favor of a defendant, and against a plaintiff, between whom a several judgment might be had in the action, and it must arise out of a cause of action, as distinguished from a cause of suit. Nor is it enough that the defendant has some cause of action against the plaintiff (*Loewenberg v. Rosenthal*, 18 Or. 178 (22 Pac. 601); *Wait v. Wheeler & Wilson Co.*, 23 Or. 297 (31 Pac. 661); *Kondo v. Aylsworth*, ante, p. 225 (158 Pac. 946), because by the positive terms of subdivision 1 a cause of action does not reach the dignity of a counterclaim unless it arises either (a) out of the contract set forth in the complaint, as the foundation of the plaintiff's claim, or (b) out of the transaction set forth in the complaint as the foundation of the plaintiff's claim; or, if the action prosecuted by the plaintiff arises on contract, then subdivision 2 permits the defendant to counterclaim by pleading "any other cause of action arising also on contract, and existing at the commencement of the action." Obviously the answer filed by Carter does not plead a cause of action arising "out of the contract * * set forth in the complaint as the foundation of the plaintiff's claim," and it is equally plain that the plaintiff is not prosecuting "an action arising on contract" (7 Standard Ency. of Pr. 982), and therefore the answer does not recite a counterclaim within the meaning of Section 74 unless it pleads a cause of action against the plaintiff arising out of the "transaction" set forth in the complaint as the foundation of the plaintiff's claim.

While it is perhaps difficult to phrase a general formula by which to determine in all cases what is the "transaction" set forth as the foundation of the plaintiff's claim, yet, notwithstanding the judicial expressions holding that "transaction" is either synonymous with "contract" or is merely the very cause of action which the plaintiff had alleged in his pleading as the ground of recovery, it is nevertheless manifest that the word means something different from the term "contract," because both words appear in the same subdivision, and if each means the same as the other, then one would be only a useless repetition of the other: Pomeroy, Code Rem. (4 ed.), § 650; *Deford v. Hutchison*, 45 Kan. 318 (25 Pac. 641, 11 L. R. A. 257). If the word "transaction" is taken in its ordinary and popular sense, it signifies "the doing or performing of any affair; that which is done or in the process of being done" (Webster's Dictionary); "a doing or performing"; "a matter or affair either completed or in the course of completion" (Century Dictionary). In Pomeroy, Code Rem. (4 ed.), Section 650, the word "transaction" as used in the Codes is spoken of as:

"Something—that combination of acts and events, circumstances, and defaults—which, viewed in one aspect, results in the plaintiff's right of action, and viewed in another aspect, results in the defendant's right of action. As these two opposing rights cannot be exactly the same, it follows that there may be, and generally must be, acts, facts, events, and defaults in the transaction as a whole which do not enter into each cause of action, but are confined to one of them alone."

In *Loewenberg v. Rosenthal*, 18 Or. 178, 184 (22 Pac. 601), the court says subdivision 1, Section 74, "would imply that it arose out of some agreement or business affair between the parties." An extended discussion

of the word may be found in *Craft Refrigerating Machine Co. v. Quinnipiac Brewing Co.*, 63 Conn. 551 (29 Atl. 76, 25 L. R. A. 856), where that court states:

“As the word is employed in American Codes of pleading and in our own Practice Act, a ‘transaction’ is something which has taken place whereby a cause of action has arisen. It must therefore consist of an act or agreement or several acts or agreements having some connection with each other, in which more than one person is concerned, and by which the legal relations of such persons between themselves are altered. * * It (Practice Book) has taken the word ‘transaction,’ not out of any legal vocabulary of technical terms, but from the common speech of men. So far as we are aware, it has never been the subject of any exact judicial definition. It is therefore to be construed as men commonly understand it. * * ”

See, also, Bliss, Code Pleading (3 ed.), § 372; 34 Cyc. 686; 38 Cyc. 937; *Burrage v. Bonanza G. & Q. M. Co.*, 12 Or. 169, 174 (6 Pac. 766).

A claim is available as a counterclaim if it arises out of a cause of action if that cause of action in turn arises out of the “transaction” set forth by the plaintiff as the “foundation” of his claim (Pomeroy, Code Rem. (4 ed.), § 650); and, therefore, if C. C. Carter has pleaded a cause of action in his answer arising out of the “transaction” set forth by Martha A. Chance as the “foundation” of her claim, then the former has pleaded a counterclaim.

The action of ejectment involves both the right of possession and the right of property. The right of possession depends upon a right of property, because the right of possession must be traced to some estate in the property; and there can be no right of possession unless it is referable to and is founded upon an estate in the property. The plaintiff merely states in

broad terms that she owns the land, that defendant has possession, and that she is entitled to possession. The defendant admits that he has possession, and in equally broad terms avers ownership in fee simple supplemented by an averment of adverse possession. Both pleadings are governed by statute, the complaint by Section 327, L. O. L., and the answer by Section 328, L. O. L., and the plaintiff has contented herself by merely setting forth the nature of the alleged estate without mentioning the transaction which supports that estate. Even though the word "transaction" be given its most comprehensive meaning, it is impossible to know from the pleading whether the estate claimed by the defendant or the possession held by him arose out of, or grew from, or is even connected with any transaction whatever relied upon by the plaintiff as the foundation of her claim, and consequently the answer does not state a counterclaim within the contemplation of Section 74, L. O. L.: *Chamberlain v. Townsend*, 72 Or. 207 (142 Pac. 782, 143 Pac. 924).

The conclusion that the answer filed by the defendant is not a counterclaim within the meaning of Section 74, L. O. L., is strengthened by the inference to be drawn from the history of the chapter concerning "action to recover real property" embracing Sections 324 to 340, L. O. L., inclusive. In 1862 the legislature passed an act entitled "An act to provide a Code of Civil Procedure." Section 72 of that act is reproduced as Section 74, Lord's Oregon Laws, and Sections 312 to 329, except Sections 325, appear in the present Code as Sections 324 to 340, and therefore Section 74 and Sections 324 to 340, L. O. L., inclusive, were adopted at the same time and as parts of the same legislative act.

5. Prior to the adoption of Chapter 173, Laws of 1913, a defendant could not plead a counterclaim "unless he, by his answer, admitted at least a part of the plaintiff's demand": *Hammer v. Campbell Gas-Burner Co.*, 74 Or. 126, 140 (144 Pac. 396). See, also, *Dove v. Hayden*, 5 Or. 501, 503; *Le Clare v. Thibault*, 41 Or. 601, 608 (69 Pac. 552). Section 328, L. O. L., permits a defendant in an action of ejectment to plead and prove any estate that he may have in the property, and this section does not contemplate that the defendant shall admit any part of the demand made by the plaintiff, because Section 328 enables the person in possession to deny that the plaintiff has any right whatsoever, and at the same time to aver in the answer that he is the absolute owner of the land and entitled to retain possession. Section 328 is a special section applicable only to one kind of action, and an answer filed under that section is in no sense a "counterclaim," as that word is used in the Code.

6. Furthermore, while the answer pleads enough to conform to a special provision of the statute applicable to actions in ejectment, nevertheless the pleading does not, strictly speaking, set forth a cause of action, because, if the new matter stood alone, it would not contain all the elements necessary for a cause of action; nor would the new matter in the pleading by itself be a complete statement of a cause of suit. Repeated decisions have declared that a counterclaim must be complete in itself, and state facts which show that the defendant is entitled to recover from the plaintiff if an action had been instituted for that purpose: *Le Clare v. Thibault*, 41 Or. 601 (69 Pac. 552); *Watson v. McLench*, 57 Or. 446, 451 (110 Pac. 482, 112 Pac. 416); *Hammer v. Campbell Gas-Burner Co.*, 74 Or. 126, 136 (144 Pac. 396). Technically, therefore, the

answer neither states a cause of action nor a cause of suit, and the pleading would not be a sufficient complaint in an action of ejectment or in a suit to quiet title, although it does comply with a special statute which enables the defendant, upon proving his claim, not only to defeat the action of the plaintiff, but also to secure affirmative relief which is akin to the aid granted by a suit to quiet title. The answer does not state a counterclaim within the contemplation of the Code; the plaintiff had an absolute right to a judgment of nonsuit; and it was therefore error to deny the motion of plaintiff.

The judgment is reversed, with directions to enter a judgment of nonsuit.

REVERSED WITH DIRECTIONS.

MR. JUSTICE BURNETT and MR. JUSTICE EAKIN absent.

Argued July 7, reversed July 18, 1916.

FIRST NAT. BANK v. BOARD OF EQUALIZATION.*

(158 Pac. 951.)

Taxation—Board of Equalization—Duties.

1. It is the duty of the board of equalization to correct assessments if they be excessively high or unreasonably low, and it has no authority to punish an applicant by refusing to equalize an incorrect assessment merely because such applicant failed to file a statement of its property as required by law.

Taxation—Board of Equalization—Correction of Assessments.

2. Under Section 3571, L. O. L., requiring the assessor to deduct from the aggregate amount of capital stock, surplus and undivided profits, the amount of investments in real estate and base his assessment upon the remainder, *held* that the failure of a bank to furnish

*Authorities on the question of method of assessing state tax on national banks are reviewed in a note in 45 L. R. A. 758. REPORTER.

the assessor a verified statement of its property within the time required by Sections 3569 and 3570 is no sufficient reason for the refusal of the board of equalization to equalize such assessment, thus penalizing the bank by a double tax on its real estate.

From Linn: WILLIAM GALLOWAY, Judge.

Department 2. Statement by MR. JUSTICE BENSON.

This is a proceeding begun by the First National Bank of Albany, before the board of equalization of Linn County, in which it was sought to have the assessment of the bank's capital stock reduced. The petition having been denied, an appeal was taken to the Circuit Court, where, after a hearing, a decree was entered affirming the action of the board, and plaintiff appeals. REVERSED.

For appellant there was a brief over the names of *Mr. Carlton E. Sox* and *Mr. G. G. Schmitt*.

For respondent there was a brief and an oral argument by *Mr. Gale S. Hill*.

MR. JUSTICE BENSON delivered the opinion of the court.

1, 2. Section 3571, L. O. L., provides that in assessing shares of stock in banks, the assessor shall deduct the amount of all investments in real estate from the aggregate amount of such capital stock, surplus fund and undivided profit, and the remainder shall be taken as a basis for the valuation of such shares of stock. Section 3570, L. O. L., provides that:

In order "to aid the assessor in determining the value of such shares of capital stock, the cashier or other accounting officer of every such bank mentioned in Section 3569 is hereby required to furnish a statement to the assessor of the county where the same is located, between the first day of April and the fifteenth

day of May, in each year, verified by oath, showing the amount and number of such shares of the capital stock of such bank, the amount of its surplus or reserve funds and the amount of its undivided profits at the hour of 1 o'clock P. M. of the first day of March preceding, the actual and cash value of all real estate owned by it in this state or elsewhere and the location of the same; also the cash value of the securities of the United States owned by it."

The required statement was not furnished by plaintiff within the time required, and on September 12th, the last day before the time when the assessor was required to turn the assessment-roll over to the board of equalization, he assessed the capital stock, using as his source of information a statement published in the "Albany Herald," by the plaintiff, purporting to show the condition of its business at the close of business on the fourth day of March. Plaintiff thereafter filed a verified statement, such as is required by Section 3570, L. O. L., and appeared with a petition before the board of equalization, seeking to have its capital stock assessment corrected in accordance therewith. The assessor found the aggregate amount of capital stock, surplus and undivided profits, as of March 1st, to be \$219,363.69. Plaintiff insists that this should be \$214,516.48. The assessor also found the value of plaintiff's real estate holdings to be \$80,470, when it should be \$193,711.49. The assessor therefore placed the final valuation of the capital stock for assessment purposes to be \$62,365, when, if plaintiff's figures are correct, it should have been \$20,804.99.

It appears to be clearly established by the evidence that the assessor had not succeeded in acquiring correct information as to all of plaintiff's real estate holdings; and the values thereof as fixed by appellant are not disputed. It is true that two or three pieces

of the real estate were on March 1st held in the names of others, but there is no question but that they were actually plaintiff's property and that it was liable for the taxes thereon. It appears from the record that the board of equalization, and also the Circuit Court, refused to correct the assessment because the plaintiff had been derelict in supplying the statement required by the statute.

The function of a board of equalization is to correct assessments whether they be excessively high or unreasonably low. In this work it has judicial duties to perform, but the statute nowhere confers upon it punitive powers. It must be conceded that plaintiff was guilty of a dereliction which is far from commendable, but it is not the province of this proceeding to punish it therefor by double taxation.

The decree of the lower court is reversed, and one will be entered here in accordance with the prayer of the petition. REVERSED. DECREE RENDERED.

MR. CHIEF JUSTICE MOORE, MR. JUSTICE BEAN and MR. JUSTICE HARRIS CONCUR.

Argued June 29, remanded July 18, 1916.

KREINBRING v. MATHEWS.

(159 Pac. 75.)

Mortgages—Action to Foreclose—Equitable Defense.

1. In a suit to foreclose a purchase money mortgage, an answer, admitting the making of the mortgage, but alleging that the mortgagee falsely represented that he was the owner of the land described in the mortgage, and that it was free from all encumbrances, and that there was valuable timber on it which he owned, and that the mortgagor, relying upon such false representations, purchased and received a general warranty against encumbrances, that the purchase money, except the mortgage note in suit, had been paid, and that the out-

standing and unexpired right to cut and remove the timber amounted to more than the note, so that there was a total failure of consideration to the mortgagor's damage, if insufficient as a counterclaim, contained all the elements of a valid defensive answer, good in equity.

Mortgages—Foreclosure—Covenants.

2. Such outstanding and unexpired right to cut and remove timber was a breach of the covenant against encumbrances which would have to be disposed of before equity would foreclose the purchase money mortgage.

Covenants—Seisin—Breach.

3. An outstanding title does not breach a covenant of seisin going to a paramount right to the fee and possession until there is an eviction or something equivalent thereto.

Covenants—Encumbrances—Breach.

4. An outstanding mortgage breaches a covenant against encumbrances when the deed is delivered.

Covenants—Seisin—Breach—Dower.

5. An outstanding right of dower is not technically an encumbrance, but an interest in the fee covered by a covenant of seisin, instead of by covenants against encumbrances.

Logs and Logging—Conveyances—Construction.

6. A conveyance of all the timber on designated land, coupled with a condition that it should be removed within ten years from the date thereof, amounted only to a sale of all the timber the grantee could cut and remove before that date.

[As to existence of right to enter and take minerals as breach of covenant against encumbrances, see note in *Ann. Cas.* 1912D, 1140.]

Appeal and Error—Remand—Leave to Apply for Further Relief.

7. In a suit to foreclose a purchase money mortgage in which the mortgagor set up the equitable defense of the mortgagee's encumbrance created by a conveyance of the timber with the right to remove it, but where, in view of the grantee's failure to cut and remove any timber, the mortgagor's damage was but small, and it reverted within six months, the cause will be remanded and continued to the expiration of the time for removal, so that damages might then be ascertained.

From Columbia: JAMES A. EAKIN, Judge.

Department 1. Statement by MR. JUSTICE McBRIDE.

This is a suit by Frank H. Kreinbring against L. P. Mathews and Bess Mathews, his wife, to foreclose a purchase money mortgage upon the southwest quarter of the northeast quarter and the northwest quarter

of the southeast quarter of section 25, township 6 north, range 5 west, Willamette Meridian, in Columbia County.

The answer admitted the making of the mortgage, but set up as an affirmative defense that on July 14, 1910, plaintiff falsely represented to defendants that he was the owner of the land described in the mortgage and that it was free from all encumbrances; that there was valuable timber upon the southwest quarter described in said mortgage, and plaintiff falsely and fraudulently represented that he owned said timber; that plaintiff, relying upon these false representations, purchased the tract described in said mortgage for the sum of \$3,500, and received from plaintiff and his wife a general warranty therefor containing a covenant against encumbrances of all kinds; that defendant paid all the purchase price except \$625, to secure which he gave the mortgage and note sued upon; that at the time said contract was entered into there was a valid and outstanding right in one M. J. Kinney to cut and remove the timber upon said southwest quarter for the term of ten years, which right does not expire until December 5, 1916; that such interest in said timber was conveyed by Kinney to the Appledale Land Company, which corporation now holds the same; that the existence of such interest was known to plaintiff, but was not known to defendants when the contract was entered into; that the value of said timber and the right to remove the same is the sum of \$750; that there has been a total failure of the consideration for which said note and mortgage was given; and that plaintiff has been damaged in the sum of \$750. Plaintiff replied denying the new matter in the answer, and alleged that at the time of said transfer defendants had full knowledge regarding the title to said timber.

There were findings and a decree for defendants canceling the mortgage and for costs, from which plaintiff appeals.

REMANDED WITH DIRECTIONS.

For appellant there was a brief over the names of *Mr. Samuel M. Johnson* and *Mr. John J. Fitzgerald*, with an oral argument by *Mr. Johnson*.

For respondents there was a brief over the names of *Messrs. Bronaugh & Bronaugh*, with an oral argument by *Mr. Jerry E. Bronaugh*.

MR. JUSTICE McBRIDE delivered the opinion of the court.

1. It is argued by plaintiff that the defendant's answer presents a counterclaim for unliquidated damages and nothing more, and that, such being the case, it cannot be successfully urged in this proceeding; but it is more than a mere counterclaim. It is pleaded not only as such, but also as an equitable defense. By it defendants say:

"It is true we gave this mortgage, but the consideration of the mortgage was falsely represented to be a tract of unencumbered land. We now find that there is upon it an encumbrance which diminishes its represented value to the extent of more than the amount of the mortgage. We are willing to discharge the mortgage so soon as the plaintiff shall have extinguished the encumbrance. If plaintiff declines to do this, we are entitled to have the value of the encumbrance deducted from the amount of the mortgage."

This is not like the case of an outstanding claim of title. Here is an encumbrance of record plain and incontestable which its owner declines to extinguish without compensation. In such a case, it would be extremely inequitable to require the defendant to pay

for what it is probable he will never get, and relegate him to a remedy upon a covenant against encumbrances, which covenant was broken when his deed was delivered. Conceding for the purposes of this case that the answer is insufficient as a counterclaim, it contains all the elements of a valid defensive answer, and was evidently so treated by the court below. We are of the opinion that the evidence sustains the findings of the court below as to the facts, and this conclusion leaves for our consideration the question of the sufficiency of these facts to justify the decree rendered.

2. Under most circumstances, a vendee of land will not be permitted to set up an outstanding title as a defense to a suit brought against him to foreclose a mortgage for the purchase money: *Edgar v. Golden*, 36 Or. 448 (48 Pac. 1118, 60 Pac. 2); *Farmers' Nat. Bank v. Gates*, 33 Or. 388 (54 Pac. 205, 72 Am. St. Rep. 724); *Gennes v. Peterson*, 54 Or. 378 (103 Pac. 515); *Abbott v. Allen*, 2 Johns. Ch. (N. Y.) 519 (7 Am. Dec. 554). A distinction seems to be made in some of the cases between an outstanding title which affects the seisin and goes to a paramount right in the fee and possession, and a mere encumbrance such as an outstanding mortgage. In the latter case, it has been held that the outstanding encumbrance must be disposed of before equity will foreclose the purchase money mortgage: *Van Riper v. Williams*, 2 N. J. Eq. 407. In *Abbott v. Allen*, 2 Johns. Ch. (N. Y.) 519 (7 Am. Dec. 554), Chancellor KENT, after stating that as a general rule a failure or defeat of title cannot be set up by the vendee to defeat a suit to foreclose a purchase money mortgage, uses this language:

“Perhaps an outstanding encumbrance, either admitted by the party or shown by the record, may form an exception, in cases of covenant against encum-

brances. Some *dicta* in the books (see *Sergeant Maynard's Case*, 2 Freem. 1, 1 Ves. 88) seem to look to that point, but I have formed no opinion respecting it."

The distinction between a defense of an outstanding title and an outstanding encumbrance is shown by contrasting two cases decided by the same court and reported in the same volume, namely, *Van Riper v. Williams*, 2 N. J. Eq. 407, and *Van Waggoner v. McEwen*, 2 N. J. Eq. 412. In the former case the defense to the foreclosure of a purchase money mortgage was that there was an unpaid mortgage outstanding when the vendee purchased, and it was held that the plaintiff could not have a decree of foreclosure until the outstanding mortgage was disposed of. In the latter case, the defense was that there was an outstanding title to a part of the land, and that no decree of foreclosure should be made until the plaintiff should have procured such title for defendant, or that, failing in that, the value of the tract owned by other parties should be deducted from the mortgage given for the purchase price. The court held that defendant must rely on the covenants in his deed, there having been no eviction. The reason for this distinction seems sound.

3-5. A covenant for title is not broken until there is an eviction or something equivalent thereto, while a covenant against encumbrances is broken when the deed is delivered if such encumbrance actually exists. In the case of *Glenn v. Whipple*, 12 N. J. Eq. 50, this distinction seems to be ignored, but an examination of that case shows that the defense set up was an outstanding right of dower, which, according to most authorities, is not technically an encumbrance, but an interest in the fee and covered by covenants of

seisin instead of those against encumbrances: *Johnson v. Elmen*, 94 Tex. 168 (59 S. W. 253, 86 Am. St. Rep. 845, 52 L. R. A. 162); *Shell v. Duncan*, 31 S. C. 547 (10 S. E. 330, 5 L. R. A. 821); *Bostwick v. Williams*, 36 Ill. 65 (85 Am. Dec. 385). In *Kuhnen v. Parker*, 56 N. J. Eq. 286 (38 Atl. 641), this case is noted as among those where an outstanding title is attempted to be set up as a defense to the foreclosure of a purchase money mortgage. This case (*Kuhnen v. Parker*) fully supports the contention of defendant in the case at bar.

6. The conveyance from Wells to Kinney purports to sell and convey all the timber upon the southwest quarter designated in the deed, coupled with a condition that it shall be removed within ten years from the date thereof, which limitations would expire on December 5, 1916. Such a conveyance amounts only to a sale of all the timber that the grantee can cut and remove before that date: *Anderson v. Miami Lumber Co.*, 59 Or. 159 (116 Pac. 1056). And the right created by it is an encumbrance: *Adams v. Reed*, 11 Utah, 480 (40 Pac. 720); *Stambaugh v. Smith*, 23 Ohio St. 584; *Cathcart v. Bowman*, 5 Pa. 317. We are satisfied that plaintiff deliberately misled defendants into believing that the timber upon the southwest quarter described was unsold, and that the purchase would not have been made or the mortgage given but for this fraudulent misrepresentation.

7. But having arrived at this conclusion, we are confronted with another difficulty. The damage which defendants are likely to suffer is largely prospective. What little testimony defendants have introduced on that subject indicates that the value of the timber is about \$700, and that the grantees of Kinney assert the right, which they undoubtedly have, to remove it; but the fact remains that up to December 7, 1914, they

had not removed a stick of it, and it is possible, and even probable, that they have not done so yet and may never do so. If they remove the timber, defendants should have credit upon the mortgage for its value. If they do not remove it by December 6, 1916, defendants' damage by reason of the encumbrance will be comparatively small, and it would be manifestly unfair to allow him credit for the value of the timber with the possibility that it may within less than six months revert to him. The rule adopted in *Van Riper v. Williams*, 2 N. J. Eq. 407, seems to be the fair one, namely, to hold up the foreclosure until the encumbrance is extinguished. The same rule is stated, though its application was not deemed necessary, in *Kuhnen v. Parker*, 56 N. J. Eq. 286 (38 Atl. 641). It is one of the attributes of equity, and its chief excellency, that it will reach out and administer specific relief according to the exigencies of the particular case, and in this instance we think that absolute justice will be promoted by remanding this cause to the Circuit Court and directing its continuance there until after December 5, 1916, and then permitting the parties to frame issues by way of supplemental complaint or answer in which the actual damage done by reason of the encumbrance can be stated, litigated and ascertained. Meanwhile the costs of this appeal will abide the final determination of the suit.

REMANDED WITH DIRECTIONS.

MR. CHIEF JUSTICE MOORE, MR. JUSTICE BURNETT and MR. JUSTICE BENSON concur.

Argued June 27, affirmed July 18, 1916.

MATHEWS v. CHAMBERS POWER CO.*

(159 Pac. 564.)

Injunction—Real Property—Cutting and Removal of Timber.

1. The cutting and removal of brush and timber on a swale leading from a mill-race across plaintiff's premises to a river, to the use of which swale defendant had no right, and which would permit the river to further encroach upon plaintiff's premises, was a willful trespass upon his land which a court of equity would enjoin.

[As to injunction against trespass, see notes in 11 Am. Dec. 497; 53 Am. Rep. 346; 99 Am. St. Rep. 731.]

Injunction—Relief—Permanent Injunction.

2. Where it appeared that a few trees remained in the swale which should be protected because the roots tended to prevent the river from washing away its banks, an injunction was properly made perpetual, so as to prevent a repetition of the trespass.

Appeal and Error—Failure to Take Cross-Appeal—Effect.

3. Where plaintiff did not take a cross-appeal from the part of the decree sanctioning the building and maintenance of the defendant's spillway on his land, it will be assumed that he was satisfied with such final determination.

From Lane: JAMES W. HAMILTON, Judge.

Department 1. Statement by MR. CHIEF JUSTICE MOORE.

This is a suit by A. C. Mathews against the Chambers Power Company, a corporation, to enjoin an alleged trespass upon real property. From a decree granting plaintiff the relief prayed for, defendant appeals.

AFFIRMED.

For appellant there was a brief with oral arguments by *Mr. Helmus W. Thompson* and *Mr. Charles A. Hardy*.

*Generally on the question of injunction against trespass to cut timber, see notes in 22 L. R. A. 233 and 43 L. R. A. (N. S.) 262.

For respondent there was a brief over the name of *Messrs. Foster & Hamilton*, with an oral argument by *Mr. R. S. Hamilton*.

Opinion by MR. CHIEF JUSTICE MOORE.

The facts are that, pursuant to the act of Congress approved September 27, 1850, Hilyard Shaw secured a donation land claim of 320 acres in section 32, township 17 south, of range 3 west, in Lane County, Oregon. Extending from a place near the southeast corner of this land to the northwest corner thereof was a slough through which some of the waters of the Willamette River flowed during the freshets in that stream. This depression through that land was deepened in places where necessary so that water, at all stages in the river, flowed in such artificial channel to the northwest corner of the claim, where it was employed in generating power which was used in operating a sawmill and a gristmill. Shaw, on March 1, 1856, and thereafter, executed to the defendant's predecessors in interest deeds conveying 23 acres of his land claim described generally as beginning at the northwest corner thereof; thence east along the northern boundary 11 chains; thence south 21 chains; thence west 11 chains to the western boundary; and thence north along such boundary 21 chains to the place of beginning. After describing this strip of land, most of these deeds so executed by Shaw contain clauses which read:

“Together with the water-power upon said premises with the right of way over Shaw's land claim to bring all the water that may be required to run the mills thereon and all other mills or machinery that may at any time or times be placed upon the above described premises of whatever kind or nature; also the right

to dig the present raceway as deep and wide as may be necessary and to bank the dirt and stone on either side; also to include sufficient dirt and stone lying adjacent to the dams for the purpose of keeping them in repair.”

The greater part of these 23 acres of land and of the water rights appurtenant thereto are now owned by the defendant, which leases water-power generated on the premises to be used in operating machinery in factories and mills erected thereon.

The plaintiff is the equitable owner by subsequent conveyances of a tract of the donation land claim, a part of his southerly boundary extending to and along the middle of a slough forming a portion of the mill-race, which waterway at this place is much wider than in other parts. From such slough a swale leads northerly, and water when high flows therein to the Willamette River. In order properly to direct the current in the mill-race, a dam about 200 feet in length has been built by the defendant across the swale. A cement spillway about 16 feet wide has also been put in the dam, which means of escape permits the surplus water at flood stages and when the mills are shut down to flow to the river. That stream, since it was first known by white persons, has changed its current southwesterly about a mile, infringing upon the Shaw claim. The swale referred to which is a part of the plaintiff's land is covered with brush and timber, the growth and presence of which tend to prevent the river from making further inroads upon his premises.

Contending that Shaw's grant to its predecessors in interest of such water-power and right of way entitled the defendant to take from the swale any and all obstructions so that logs, trees, roots and limbs flowing thereon and over the spillway might not lodge and

thereby back up the water causing damage, its managing agent caused such brush and timber growing in the swale to be cut and removed without the plaintiff's consent, whereupon this suit was instituted and terminated as hereinbefore mentioned.

1. Another appeal from a decree rendered in a suit instituted against this defendant to enjoin it from widening the mill-race through premises below the plaintiff's land is also before us. It was stipulated by the parties hereto that the evidence received in that suit should, as far as applicable, be considered herein. whatever conclusion may be reached in that case is deemed unimportant in this suit; for from a careful examination of all the testimony adverted to it is believed that Shaw's prior grant of the water-power and of the mill-race to the defendant's predecessors in interest was not then intended by the parties to such deeds to include any right to the use of the swale leading from such race across the plaintiff's premises to the Willamette River. This being so, the cutting and removal of the brush and timber was a willful trespass upon his land authorizing a court of equity to enjoin the invasion of his right, since the severing of such shrubs and trees may permit the river further to encroach upon the plaintiff's premises to the destruction of his estate therein: *Smith v. Gardner*, 12 Or. 221 (6 Pac. 771, 53 Am. Rep. 342); *Allen v. Dunlap*, 24 Or. 229 (33 Pac. 675); *Mendenhall v. Harrisburg Water Co.*, 27 Or. 38 (39 Pac. 399); *Union Power Co. v. Lichty*, 42 Or. 563 (71 Pac. 1044); *Moore v. Halliday*, 43 Or. 243 (72 Pac. 801); *Roots v. Boring Junction Lum. Co.*, 50 Or. 298 (92 Pac. 811, 94 Pac. 182); *Chapman v. Dean*, 58 Or. 475 (115 Pac. 154).

2. It is maintained by defendant's counsel that, the trespass complained of having been committed, the court erred in making the injunction perpetual. It is

argued that no occasion to repeat the injury alleged can arise until the brush and trees grow in the swale, which reproduction will require about 20 years. The testimony shows that a few trees remain in the swale, which timber should be protected because the roots imbedded in the soil tend to prevent the river from washing away the banks of the plaintiff's land. If the defendant had cut and removed from the swale all the trees and brush, and no others could be grown therein, it is possible the rule adopted in *Ewing v. Rourke*, 14 Or. 514 (13 Pac. 483), might apply. In that case the refusal to enjoin a trespass upon real property was put upon the ground that the wrong complained of had spent its force, and the injured party should resort to an action at law to recover the damages sustained. The defendant's agents and servants may again be tempted to cut and remove the remaining brush and timber as occasion for their destruction may seem to demand, and in order to prevent a repetition of the trespass the injunction was properly made perpetual.

3. The plaintiff did not take a cross-appeal from that part of the decree which sanctioned the building and maintenance of the spillway on his land, and for that reason it will be taken for granted that he is satisfied with such final determination: *Thornton v. Krimbel*, 28 Or. 271 (42 Pac. 995); *Goldsmith v. Elwert*, 31 Or. 539 (50 Pac. 867); *Board of Regents v. Hutchinson*, 46 Or. 57 (78 Pac. 1028); *McCoy v. Crossfield*, 54 Or. 591 (104 Pac. 423); *Bank of Commerce v. Bertrum*, 55 Or. 349 (104 Pac. 963, 106 Pac. 444).

It follows that the decree should be affirmed, and it is so ordered.

AFFIRMED.

MR. JUSTICE BENSON, MR. JUSTICE BURNETT and MR. JUSTICE MCBRIDE concur.

Submitted on briefs May 1, affirmed May 23, rehearing denied July 25, 1916.

HIGGS v. McDUFFIE.

(157 Pac. 794; 158 Pac. 953.)

Mortgages—Foreclosure—Redemption.

1. Section 422, L. O. L., provides for personal judgment on mortgage foreclosure where a note or other personal obligation has been given, while Section 423 provides that any person having a lien subsequent to plaintiff, or who has given a note or other personal obligation for the payment of the debts secured by the mortgage, shall be made a party defendant. Plaintiff purchased land, giving a purchase money mortgage. Thereafter he resold the land, his grantees assuming payment of the purchase money mortgage, and delivering to plaintiff notes secured by a second mortgage; these, plaintiff negotiated. On foreclosure of the purchase money mortgage, plaintiff was made a party, as was the second mortgagee, and judgment of foreclosure was entered; personal judgment being rendered against plaintiff. Section 245 declares that redemption may be made, first by the judgment debtor or his successor in interest; second, by a creditor having a lien by judgment on any portion of the property. *Held* that, upon rendition of a personal judgment against him, plaintiff became a judgment debtor entitled to redeem.

Mortgages—Foreclosure—Redemption.

2. Under Section 427, L. O. L., declaring that a decree of foreclosure shall have the effect to bar the equity of redemption, grantees of the mortgagor, who assumed payment of the mortgage but defaulted, have no right of redemption after foreclosure; personal judgment being rendered only against the mortgagor.

Mortgages—Redemption—Estoppel.

3. Where mortgaged land was conveyed and the grantee assumed payment, the grantor is not estopped, the grantee having defaulted in payment of the mortgage, to assert his right of redemption; personal judgment against the mortgagor having been rendered on foreclosure.

Mortgages—"Equity of Redemption."

4. In modern jurisprudence, the words "equity of redemption" designate the fee-simple estate of the mortgagor encumbered by the mortgage, and it is this that is conveyed by deed of the mortgagor, and by provision of Section 427, L. O. L., is barred by decree of foreclosure.

Mortgages—Foreclosure—Right to Redeem.

5. Under Section 427, L. O. L., providing that a decree of foreclosure shall bar the equity of redemption, there is, after the foreclosure, no right to redeem because of the prior ownership of the equity of redemption.

[As to right to redeem as incident of mortgage, see note in Ann. Cas. 1912D, 959.]

Mortgages — Foreclosure—Redemption—Judgment Debtor — Successor in Interest.

6. Where, in foreclosure after conveyance of the land by the mortgagor, there is personal judgment against him alone, he is the judgment debtor, and his grantee of the land is not his successor, within Sections 245, 427, L. O. L., giving right to redeem to the judgment debtor or his successor in interest; this referring to his successor in interest as judgment debtor.

From Morrow: GILBERT W. PHELPS, Judge.

In Banc. Statement by MR. JUSTICE BURNETT.

This is an action by A. K. Higgs against George McDuffie, sheriff of Morrow County, Oregon, substituted as defendant in place of Marion Evans, former sheriff of Morrow County, Oregon.

On January 21, 1905, the plaintiff purchased 1,040 acres of land in Morrow County, which will be called "Lot A," and as part of the purchase price gave his note to the grantor for \$6,000, securing the same by a mortgage on the premises. He had acquired a quarter-section of land from another source, which we will call "Lot B," and on April 12, 1906, conveyed both tracts to N. E. Winnard and H. P. Goodman. This deed was in the usual form of grant, bargain and sale, and contained this covenant:

"And the grantors above named, do covenant to and with the above-named grantees, their heirs and assigns, that the above granted premises are free from all incumbrances, except one certain mortgage securing the sum of \$6,000.00, with interest, due C. M. Farnsworth, which is hereby assumed by the said grantees above named, and that they will and their heirs, executors, and administrators, shall warrant and forever defend the above granted premises, and every part and parcel thereof, against the lawful claims and demands of all persons whomsoever, except the said mortgage above mentioned."

The excepted mortgage was the one given by Higgs in the first instance to secure the purchase price. When the latter sold to Winnard and Goodman he took from them their purchase money mortgage securing their two notes to him for \$2,000 and \$8,000, respectively, covering all the lands included in his deed to them. On October 4, 1909, the \$2,000 note having been paid, Higgs before its maturity indorsed the \$8,000 note to F. H. Strong, together with the mortgage securing the same. By subsequent conveyances the title of Winnard and Goodman inured to James M. Phillips, trustee of the bankrupt estate of A. W. Lueders. On May 20, 1913, Mrs. Farnsworth brought suit to foreclose her \$6,000 mortgage against Higgs and wife, making defendants of them, together with Strong, holder of the second mortgage, and Phillips, bankrupt trustee. In that suit Strong brought in the makers of the note which he held, and filed a cross-complaint against all the defendants demanding foreclosure of his junior mortgage. No other appearance was made by any defendant. On November 29, 1913, the court rendered a decree of foreclosure in which Mrs. Farnsworth recovered judgment against Higgs for \$5,000, with interest from January 21, 1912, at 8 per cent per annum, for \$400 attorneys' fees, and for costs and disbursements taxed at \$44.90. In the same decree Strong was awarded judgment against Winnard and Goodman, as makers, and Higgs, as indorser, for \$8,000, with interest from April 12, 1912, at 8 per cent per annum, for \$600 attorneys' fees, and for costs and disbursements taxed at \$42.90. The decree declared the mortgage held by Mrs. Farnsworth to be a first lien upon all of lot A and the one held by Strong to be second on lot A and first on lot B; directed that they both be foreclosed; that the two lots be sold

separately, the proceeds of lot A to be applied to the payment of the Farnsworth mortgage, and the overplus, if any, together with those of the sale of lot B devoted to the discharge of the Strong mortgage; and that all the defendants named, except Strong, be barred and foreclosed of all estate, claim, right, title, interest or equity in the mortgaged premises, save only the statutory right of redemption. On December 9, 1913, on the joint praecipe of Farnsworth and Strong, an execution was issued to enforce the decree, and at the sale T. J. Mahoney purchased lot A for the exact amount due on the decree in favor of Mrs. Farnsworth, and Strong bought lot B for \$1,000. The sale was confirmed February 14, 1914. On April 11, 1914, empowered by the order of the court in which the bankrupt proceeding was pending, Phillips, trustee, quit-claimed all his estate, right, title, interest and equity of redemption, and that of the estate of Lueders, bankrupt, to Mahoney, in and to a great part, but not all, of the property included in the decree of foreclosure, as disclosed by the record. On the same date Strong assigned, transferred and set over to Higgs the judgment and decree made in favor of Strong in the foreclosure suit, together with "all benefits and advantages of the said judgment and decree including costs and disbursements and any and all right which the said Fred Hiram Strong has or may have to redeem any of the property described in the pleadings in the above-entitled cause from the sale thereof under proceedings in said cause." Under these circumstances, Higgs applied to the sheriff to redeem the property. Mahoney objecting, the sheriff refused to allow the redemption, and this proceeding in *mandamus* was instituted to compel the officer to permit redemption. On final hear-

ing the writ was made peremptory, and the defendant sheriff appeals.

Submitted on briefs under the proviso of Supreme Court Rule 18: 56 Or. 622 (117 Pac. xi). **AFFIRMED.**

For appellant there was a brief submitted over the names of *Mr. Clinton E. Woodson* and *Mr. J. Bowerman*.

For respondent there was a brief over the names of *Mr. Andrew G. Thompson, Messrs. Winter, Wilson & Johnson* and *Mr. Glenn Y. Wells*.

MR. JUSTICE BURNETT delivered the opinion of the court.

1. It is conceded that the proper amount of money was tendered for redemption purposes within the statutory time. The only question presented is the right of Higgs to compel redemption. We quote the following sections from Lord's Oregon Laws:

"A lien upon real or personal property, other than that of a judgment or decree, whether created by mortgage or otherwise, shall be foreclosed, and the property adjudged to be sold to satisfy the debt secured thereby by a suit. In such suit, in addition to the decree of foreclosure and sale, if it appear that a promissory note or other personal obligation for the payment of the debt has been given by the mortgagor or other lien debtor, or by any other person as principal or otherwise, the court shall also decree a recovery of the amount of such debt against such person or persons, as the case may be, as in the case of an ordinary decree for the recovery of money": Section 422.

"Any person having a lien subsequent to the plaintiff upon the same property or any part thereof, or who has given a promissory note or other personal

obligation for the payment of the debt, or any part thereof, secured by the mortgage or other lien which is the subject of the suit, shall be made a defendant in the suit, and any person having a prior lien may be made defendant at the option of the plaintiff, or by * * order of the court when deemed necessary": Section 423.

"A decree of foreclosure shall have the effect to bar the equity of redemption, and property sold on execution issued upon a decree may be redeemed in like manner and with like effect as property sold on an execution issued on a judgment, and not otherwise": Section 427.

"Property sold subject to redemption, as provided in the last section, or any part thereof separately sold, may be redeemed by the following persons or their successors in interest: 1. The judgment debtor or his successor in interest, in the whole or any part of the property separately sold; 2. A creditor having a lien by judgment, decree, or mortgage on any portion of the property, or any portion of any part thereof, separately sold, subsequent in time to that on which the property was sold. The persons mentioned in subdivision 2 of this section, after having redeemed the property, are to be termed redemptioners": Section 245.

The right of redemption after decree, being statutory only, our sole task is to construe the Oregon legislation on the subject and apply it to the facts about which there is no substantial dispute.

Higgs claims a right to redeem in a dual character, first, as a judgment debtor, and, second, as a lien creditor; that is to say, as assignee of Strong. It is necessary to consider only his rights as a judgment debtor. He was made a defendant under that portion of Section 422, L. O. L., referring to a promissory note or personal obligation for the payment of the debt whether given by any person as principal, or other-

wise. In pursuance thereof the court foreclosed the mortgages, rendered a personal decree against him for the amounts due, in the first case as the maker of the note there involved, and in the other as the indorser of the one originally given to himself. He was thus unquestionably a judgment debtor within the meaning of the statute. Although the mortgage he gave was for the purchase price of the land, he is none the less for the purposes of this case a judgment debtor under the decree, and the fact that no deficiency judgment could have been rendered against him in that proceeding does not alter the question. He comes clearly within the section of the Code allowing him to redeem.

2, 3. It is argued that he lost this right by having previously conveyed the premises to Winnard and Goodman. This is a misconception of the law, as well as the terms of the deed. The right to redeem had never yet arisen. It was not then in being. No such person as a judgment debtor or redemptioner had entered into the calculation. All he conveyed to Winnard and Goodman was the equity of redemption. The deed was made expressly subject to the mortgage encumbrance upon the land and the grantees therein covenanted to pay the same. In taking the quitclaim deed from the trustee in bankruptcy after the sale Mahoney took nothing, for the estate of the bankrupt being subject to the mortgage was barred under the terms of Section 427, L. O. L. Neither the trustee nor his bankrupt was personally liable for the debt, and therefore were not judgment debtors within the meaning of the statute. Neither the trustee nor any of his grantors were "successors in interest" of the "judgment debtor," because when they bought there was no such personage to succeed. They acquired an

estate containing within itself by the terms of the instrument creating it the elements which afterward worked out its dissolution. This was accomplished by the foreclosure, and all the interest they had was eliminated by that procedure under Section 427, L. O. L.

The right of redemption is a creature of the statute, and, as applied to the instant case, arises only after a sale upon a decree including a personal judgment against a defendant. When this right accrues, it may be transferred by the judgment debtor to anyone, and the latter thus becomes a successor in interest. Evidently it is to such a person purchasing from the judgment debtor after the sale that the redemption section refers in speaking of the "judgment debtor or his successor in interest." The foreclosure extinguished all titles junior to the mortgages. None of the previous holders having such estates could redeem, as none of them is in the category of redemptioners. That litigation stripped the land of all claims subsequent to the mortgages and offered the naked legal title for sale so as to create a fund to which alone they could look for payment. The land was subject to redemption by the judgment debtor who came into being at the rendition of the decree, and not before. This individual, having no existence prior to the decree with its feature of personal judgment, is the only one entitled to redeem. He is not estopped by reason of the covenant in his deed because it was made subject to the mortgage. In other words, that encumbrance was a condition of the estate conveyed. It was in effect a defeasance clause by means of which the title of the grantees might be defeated. They foresaw the possible result which might arise from foreclosure, to the effect that their holding would be extinguished,

and a new statutory right of redemption would arise and be vested in him of whom they had bought and who would become a judgment debtor entitled in that character to rescue the land from the effect of the sale. It is not a case of a covenanting grantor trying to enforce an after-acquired title in face of his deed. It is an instance where he is entitled to enjoy the results which the law deduces from the very instrument under which his grantees and their successors in interest would resist his claim. They cannot complain, because they have not kept the faith of their covenant to assume and pay the mortgage. They cannot escape the consequences which the statute visits upon them, to wit, elimination of their estate by foreclosure with the coincident creation of the right of redemption to be exercised by the judgment debtor. All these sequelae flow from the deed under which the grantees of Higgs combat his right to redeem. They were to be expected by them and cannot now be avoided. To hold otherwise would be to allow them and their successor in interest, the purchaser at the sale, to refuse to pay the mortgage, and at the same time to reap an advantage over the man primarily liable for the same, all by virtue of their having broken covenant with him. Higgs never has lost his character as a judgment debtor, and there was nothing in his deed preventing him from assuming it when it came into being. Indeed, it is the natural consequence of the very terms of the deed, unless the grantees had observed its conditions.

The judgment is affirmed.

AFFIRMED.

MR. JUSTICE EAKIN did not sit.

Denied July 25, 1916.

ON PETITION FOR REHEARING.

(158 Pac. 953.)

Mr. Clinton E. Woodson and Mr. J. Bowerman, for the petition.

Mr. Andrew G. Thompson, Messrs. Winter, Wilson & Johnson, and Mr. Glenn Y. Wells, contra.

In Banc. MR. JUSTICE BURNETT delivered the opinion of the court.

4-6. The principal contentions of the defendant in his petition for rehearing are that the court erred in the former opinion in holding that the plaintiff conveyed to Winnard and Goodman only the equity of redemption in the land in question, and that he was properly a judgment debtor, entitled to redeem the premises from the execution sale under the decree. Apparently counsel impute to the phrase "equity of redemption" the common-law signification, but this is erroneous. It is true, indeed, that under our Code, and decisions in pursuance thereof, the mortgagee takes no title by virtue of the mortgage it being only a lien upon the premises. Mr. Chief Justice SEEVERS in *Mayer v. Farmers' Bank*, 44 Iowa, 212, 216, says:

"The equity of redemption must not be confounded with a right of redemption. A mortgagor has an equity of redemption until the sale, and not afterward. * * After sale, he has a right of redemption if the statute gives it."

In *Sellwood v. Gray*, 11 Or. 534 (5 Pac. 196), Mr. Justice LORD states the following:

“In this state a mortgage does not operate, as at common law, to vest in the mortgagee an estate upon condition, the breach of which works a forfeiture of his estate and renders it absolute. It is, in fact, what the parties intended, and as equity treated it, a mere security for the repayment of the debt or obligation, and serves simply to create a lien or encumbrance upon the property. The title, both before and after condition broken, remains in the mortgagor until foreclosure and judicial sale. The mortgage works no change of ownership in the property. It is still the property of the mortgagor, in law and in equity, is liable for his debts, may be sold under execution, conveyed or devised, is subject to dower, or may be again mortgaged, as any other estate in land. Nor do any of the qualities or incidents of an estate in land attach in the mortgagee. He has but a lien upon the land as a security for repayment, and which cannot operate to affect the possession of the mortgagor without his consent, or to transfer his estate in the land, except after default, and by force of a judicial sale under a decree of foreclosure. But, before such proceedings are had, payment of the debt by the mortgagor will extinguish the lien and free the estate from the mortgage. Although this right of the mortgagor to intervene, after default and before judicial sentence, and discharge the mortgage, is usually termed his ‘equity of redemption,’ it is not so in fact, or in equity, in the sense which recognizes the legal estate in the mortgagee, defeasible before and absolute after default, and which, on the condition of paying his debt, allowed him to redeem a forfeited estate and demand a reconveyance. * * His equity of redemption is the right to redeem from the mortgage—to pay off the mortgage debt—until this right is barred by a decree of foreclosure; but until this right is barred, his estate in law or in equity, is just the same after, as it was before, default. It is a right, though, of which the law takes no cognizance, and is enforceable only in equity, and has nothing to do with our statute of redemptions.”

The words "equity of redemption" constitute a terminology coming down to us from common-law times, when a mortgage actually passed the title to the mortgagee, subject to redemption and reconveyance to the mortgagor on his paying the debt. In modern jurisprudence the same words are used to designate the fee-simple estate of the mortgagor encumbered by the lien of the mortgage, there being no title conveyed to the mortgagee by that instrument: *Kortright v. Cady*, 21 N. Y. 343 (78 Am. Dec. 145); *Navassa Guano Co. v. Richardson*, 26 S. C. 401 (2 S. E. 307); 3 Words and Phrases, p. 2447; 2 Words and Phrases (Second Series), p. 310. The common-law term is now applied to an estate materially different from that originally so designated. It was this modern estate which Higgs, as owner thereof, conveyed to Winnard and Goodman, and which by mesne conveyances ultimately vested in Phillips, as trustee of the bankrupt, Lueders. Higgs could not transfer any greater or more perfect title than this, for he had it not to sell. It was also the estate which the foreclosure extinguished, for Section 427, L. O. L., explicitly says "a decree of foreclosure shall have the effect to bar the equity of redemption." Unless he becomes a judgment debtor under the decree, the one who hitherto held the equity of redemption is cut off from all right to redeem the land. Prior to the decree his right to redeem depended upon his mortgage contract, but that was swept out of existence by the decree of foreclosure. If it could be explained that the bankrupt estate of Lueders owed anything on the decree or judgment, then its transfer to Mahoney might enable him to prevent redemption by another. But neither Lueders nor his estate was liable for any part of the money due on the decree. Not a dollar of it

could be demanded from that source. The only effect the decree of foreclosure had in that direction was to destroy all the title inuring to Lueders because he took subject to the mortgage. His contract right to redeem, or, in other words, his equity of redemption, named in Section 427, L. O. L., all he took as successor of Higgs in his character as owner or mortgagor, was gone beyond recall. After the decree it could not be made the basis of any further operation affecting the title. When Higgs conveyed, he was not a judgment debtor, and could not transfer any right of such a character, for there was nothing of the kind in existence to sell. When, and not until, by the decree it had been determined that Higgs was a judgment debtor, a statutory privilege appertaining to one thus declared to be personally liable for the debt came into being for the first time. It related exclusively to the particular lands in question, and only then or afterward could anyone become the successor in interest of the judgment debtor within the true meaning of Section 245, L. O. L., read in connection with Section 427, L. O. L., both being parts of the same act.

After decree, with all propriety, the judgment debtor could have assigned to Jones the right to redeem tract A, reserving to himself the redemption of tract B. Jones would then have been the successor in interest of the judgment debtor in a part of the property separately sold, within the meaning of Section 245, L. O. L. In short, there cannot be a successor to a judgment debtor until there is a judgment debtor to succeed. This statutory right of redemption is not referable to, nor does it depend upon, any conveyance of the pre-existing equity of redemption, for the latter, as Mr. Justice LORD said in *Sellwood v. Gray*, 11 Or. 534 (5 Pac. 196), has nothing to do with our statute of re-

demptions. The distinction between the equity of redemption, properly so called, and the statutory right of redemption, is clearly pointed out by Mr. Justice SOMERVILLE in *Powers v. Andrews*, 84 Ala. 289, 291 (4 South. 263, 264), thus:

“It has often been said by this court that this right of redemption under the statute is purely the creature of legislation, and has no existence without it. It is essentially different from the equity of redemption, recognized by the common law. That right is property, capable of sale by transfer, or under execution, or decree of a chancery court. It can only be exercised before a foreclosure of the mortgage, under a decree of a court of equity, or before a sale, under a power in the mortgage. It cannot be exercised after a valid foreclosure, either under a power of sale, or under a decree, unless in the case of voidable sales, where the mortgagee has acted as both seller and purchaser without the consent of the mortgagor, so as to justify the court in setting aside the sale for constructive fraud. * * The statutory right of redemption, on the contrary, comes into existence only after the equity of redemption proper has been cut off by sale or foreclosure. Until then, it would seem, it cannot spring into life. And we have uniformly decided that this privilege is neither property, nor the right of property, that it is not subject to levy or sale as such under execution, and that it is a right or privilege personal to the debtor.”

For illustration, suppose Brown, without giving any personal obligation on his part, mortgages his land to secure the promissory note of Smith. In the event of foreclosure the mortgagor, Brown, not having become a judgment debtor, because he did not owe anything, would not have the statutory right of redemption. His contract right of redemption or his equity of redemption, to use the phrase of the Code, would be barred by the decree. The judgment debtor, Smith.

would have the privilege of redeeming; but it would avail him nothing, because he never had any estate to which he could be restored.

Contending that, even after foreclosure, title to the premises sold at foreclosure remains in the mortgagor or his successor in interest until execution and delivery of sheriff's deed, counsel has cited *Dray v. Dray*, 21 Or. 59 (27 Pac. 223), and *Kaston v. Story*, 47 Or. 150 (80 Pac. 217, 114 Am. St. Rep. 912). The first of these cases treated of an execution sale on a judgment at law, and had no reference to foreclosure decrees. It further makes a very clear distinction between equity of redemption and the right of a judgment debtor to redeem after sale, saying that the latter is purely a legal right. The court did not have under consideration the statute on foreclosures, which says the decree shall have the effect to bar the equity of redemption. In its facts, *Kaston v. Story* is not hostile to the theory that only one in debt at the time upon the decree is qualified to exercise or transfer the statutory right of redemption, for there, as disclosed by the record in this court, it was the judgment debtor who conveyed, and that, too, subsequent to the decree, when he had nothing to sell except that legal right. In very truth, Kaston, the plaintiff there, succeeded only to this statutory privilege of redeeming, not from the mortgage, but from the sale: *Flanders v. Aumack*, 32 Or. 19, 30 (51 Pac. 447, 67 Am. St. Rep. 504, note). He had nothing to do with the equity of redemption, for that had been barred by the decree.

Commonwealth etc. Assn. v. Parker, 84 Ala. 298 (4 South. 268), cited by the defendant, holds that the conveyance of the equity of redemption prior to foreclosure waives the subsequent statutory right of redemption, because redemption itself implies a present

ownership in property. This case is not in point here, even on that theory, for Higgs sold his equity of redemption subject to the mortgage which his grantees assumed, but did not pay. This of itself would be an exception to what would otherwise be a waiver under the Alabama case, and he would be entitled to all the privileges conferred by statute and attendant upon the personal decree against him in the foreclosure suit. Moreover, that case, as well as *Powers v. Andrews*, 84 Ala. 289 (4 South. 263), is distinguishable from the one in hand, for our statute recognizes the successor in interest of the judgment debtor as a proper redemptioner, thus making provision for an assignment of the right which the Alabama statute did not. This is taught by *Rosenberg v. Croisan*, 18 Or. 470 (23 Pac. 847). *Miller v. Ayres*, 59 Iowa, 424 (13 N. W. 436), only teaches that the right of redemption under consideration is purely a creation of statute, and that a surety, not being within its terms, cannot exercise that privilege.

It is contended that our former decision overruled *Willis v. Miller*, 23 Or. 352 (31 Pac. 827), but there a redemption in the name of the judgment debtor was recognized and enforced. The principal question there involved was the effect of the redemption. The plaintiff contended that such a redemption from foreclosure sale returned the land to the redemptioner discharged of all claims on account of the mortgage debt, while the defendant maintained that it was yet liable for the unpaid deficiency remaining due on the decree. Justices BEAN and MOORE upheld the plaintiff's contention, while Mr. Chief Justice LORD approved the defendant's position. The fallacy of what was said in *Lauriat v. Stratton* (C. C.), 11 Fed. 107, about who is a judgment debtor, and followed in *Willis v. Miller*,

arguendo, lies in the assumption that he who purchased the equity of redemption prior to the entry of the decree has some right to the land after foreclosure, and hence sustains the same relation to the decree as the successor in interest of a judgment debtor in a judgment at law. This leaves out of the calculation the effect given to the decree by the statute, namely, barring the equity of redemption, while a judgment at law does not bar the title but only operates as a lien upon it. In equity the previous title is extinguished by the decree, while at law the title does not pass until delivery of the sheriff's deed.

The doctrine of *Williams v. Wilson*, 42 Or. 299 (70 Pac. 1031, 95 Am. St. Rep. 745), is directly opposed to the theory of the defendant that one who once held the equity of redemption has on that account some right to operate as a redemptioner after the decree of foreclosure. Following the statute, the substance of that case is that the decree ends all title of the mortgagor and those claiming subject to the mortgage, and thenceforward whatever rights they exercise must be by virtue of the decree acting upon the fund created by the sale. If the holder of the equity of redemption had any power over the property after decree, the functions of the court rendering the same would be useless and of no effect; but the true doctrine is that upon foreclosure the court seizes upon the title affected by the mortgage, divests it of that lien, and also of all subsequent claims, as well as the equity of redemption named in the statute, and offers the pledged estate, thus shorn of encumbrances, for sale for the purpose of creating a fund to satisfy the various demands against it. The decree puts a quietus upon the equity of redemption and all subsequent liens. Claimants, including the erstwhile holder of the equity of redemp-

tion, must then and afterward look to the fund and not to the land for satisfaction.

In the case of *Yoakum v. Bower*, 51 Cal. 539, it was decided that a defendant in execution can redeem from an execution sale, notwithstanding he has conveyed to another the property sold under execution. This was under a statute almost identical with ours. Again, in *Harvey v. Spaulding*, 16 Iowa, 397 (85 Am. Dec. 526), the Code provided that the judgment debtor might redeem at any time within one year from the date of sale, and it was held that he could do so, although he had previously sold the land to another party. Also, in *Livingston v. Arnoux*, 56 N. Y. 507, construing an enactment substantially like our own, the court says:

“The right of the judgment debtor whose title has been sold on execution to redeem from the sale does not depend upon the condition of his title at the time of the sale or redemption. The language of the statute is direct and unambiguous. The right is given to the person against whom the execution issued, and whose title was sold thereon. It follows the person, and not the land, and continues for the period allowed by law, although the debtor meanwhile may have parted with his title. The right secured to the judgment debtor to redeem, although he has conveyed the land, is often an important and valuable one. Where he has conveyed with warranty, he is enabled thereby to protect the title of his grantee, and secure himself against liability; and if he has received a full consideration for the land, it is just and equitable that he should discharge it, by redemption, from the lien acquired by the purchaser on the sale, although he may not have bound himself by any covenant to do so. Nor is there any incongruity in holding that the right of redemption coexists in the judgment debtor and his grantee. Where the former has conveyed the land, his redemption will inure to the benefit of the holder of the legal title, and the owner has the means of pro-

protecting his own interest, if the judgment debtor is either unable or unwilling to make the redemption.”

It is plain that Higgs was a judgment debtor under the decree, and as such he had a right to redeem, irrespective of the condition of the title when he made the offer. We adhere to the former opinion.

AFFIRMED. REHEARING DENIED.

MR. JUSTICE EAKIN took no part in the consideration of this case.

MR. JUSTICE BEAN delivered the following specially concurring opinion:

I concur in the result of the learned opinion of Mr. Justice BURNETT, but am unable to accede to all the rulings given as a reason for reaching the conclusion:

(1) To the effect, as stated, that “when Higgs conveyed, he was not a judgment debtor, and could not transfer any right of such a character, for there was nothing of the kind in existence to sell.” In a strong opinion in the case of *Lauriat v. Stratton* (C. C.), 11 Fed. 107, at page 114 thereof, in considering a case under our redemption statute, Judge DEADY said:

“At the date of the mortgages to Swegle and Cooke, Mary Hall was the owner of this property, and, for the purpose of redemption, is to be deemed the judgment debtor in the decree providing for the enforcement of the liens of said mortgages. But at the date of this decree Hessie J. Shane had become the successor in interest of Mary R. Hall, and before the redemption by Stratton, Clarno and Liebe had succeeded to her interest, and sustained the same relation to this decree as the successor in interest of a judgment debtor in a judgment at law.”

The same enunciation was made by Mr. Chief Justice LORD in *Willis v. Miller*, 23 Or. 352 (21 Pac. 827). The opinion of Judge DEADY, I think, has stood the test of

time. A contrary ruling in my opinion is unnecessary to a determination of the present case. In *Jacobson v. Lassas*, 49 Or. 470, 473 (90 Pac. 904, 905), Jacobson, the successor in interest of the mortgagor taking before foreclosure, was held by this court, in an opinion by Mr. Justice MOORE, to be a successor in interest entitled to redeem under the statute, the court saying:

“The redemption of the real property by the plaintiff herein abrogated the sale of the premises, and restored to him, as successor in interest of Lettie McCarty, the estate in the land as if the first mortgage thereon had never been given.”

(2) In the opinion of Mr. Justice BURNETT it is stated:

“In equity the previous title is extinguished by the decree, while at law the title does not pass until the delivery of the sheriff’s deed.”

In the case of *Kaston v. Storey*, 47 Or. 150 (80 Pac. 217, 114 Am. St. Rep. 912), in discussing the effect of a sale under a decree of foreclosure, it is said by former Mr. Justice BEAN:

“A mortgage of real property in this state does not pass the title, but merely creates a lien: *Anderson v. Baxter*, 4 Or. 105; *Sellwood v. Gray*, 11 Or. 534 (5 Pac. 196). The legal title remains in the mortgagor or his successor in interest until a sale under a foreclosure decree has ripened into a title by the execution and delivery to the purchaser of a sheriff’s deed in due course of law.”

In *Dray v. Dray*, 21 Or. 59 (27 Pac. 223), it is stated:

“After the sale of real property upon execution the legal title still remains in the judgment debtor until the sheriff’s deed is executed.”

Referring to the quotation in the opinion of Mr. Justice BURNETT from *Livingston v. Arnoux*, 56 N. Y. 507,

which it seems to me is applicable to the case in hand, we find:

“Nor is there any incongruity in holding that the right of redemption coexists in the judgment debtor and his grantee. Where the former has conveyed the land, his redemption will inure to the benefit of the holder of the legal title, and the owner has the means of protecting his own interest, if the judgment debtor is either unable or unwilling to make the redemption.”

In the case at bar Higgs asks to redeem as the first mortgage debtor, and as such under the statute has the right to do so, provided he has a sufficient interest in the mortgaged premises. This interest he has by virtue of being an indorser or surety upon the note transferred to Strong, and in the foreclosure suit he is a judgment debtor as to the second mortgage. By the decree he is not precluded from redeeming from the sale. It is thus laid down in 2 Wiltsie on Mortgage Foreclosure (3 ed.), Section 1124:

“On the well-recognized principle that a surety has the right to avail himself of the securities held by the creditor, after he has satisfied the debt, a surety for the mortgage debt, even though he has no interest in or lien upon the mortgaged estate, has a right to redeem from the mortgage lien and be subrogated to the rights of the mortgagee.”

The amount received at the foreclosure sale does not change the right of redemption. If the property had brought \$4,000, and Higgs was still liable for the difference of about \$2,000 on the judgment upon the first mortgage note, his right to redeem as a judgment debtor would seem clear. In short, as well stated by Mr. Justice BURNETT, in order for Winnard and Goodman, or their grantee or successor in interest, in whose shoes Mahoney now stands, to have the right to redeem, or the right to prevent the judgment debtor or

original mortgagor from redeeming, it is incumbent upon them to pay the judgment for the second mortgage debt. Our statute appears to contemplate that more than one party may have the right to redeem. In the case at bar the superior right is in Higgs. I am not prepared to concede that the grantee of a mortgagor, taking the conveyance before suit to foreclose and paying therefor, has not the right to redeem under the statute after a sale upon a decree of foreclosure.

Submitted on briefs July 10, affirmed July 25, 1916.

THEILER v. TILLAMOOK COUNTY.*

(158 Pac. 804. See, also, 75 Or. 214.)

Damages—Duty to Reduce.

1. A municipal corporation is not liable for such continuing damage from a culvert diverting water on to land as could have been avoided by the exercise of reasonable and ordinary diligence by the land owner in preventing it.

[As to right of municipality to drain water from highway on to adjoining land, see note in *Ann. Cas.* 1912B, 915.]

Negligence—Contributory Negligence—Failure to Reduce Damages.

2. The failure of plaintiff to reduce damages suffered by the exercise of reasonable care is not contributory negligence, which is such an act or omission on plaintiff's part amounting to an ordinary want of care as, concurring or co-operating with the negligent act of defendant, is the proximate cause or occasion of the injury complained of; while a failure to reduce damages does not preclude recovery, but merely affects the amount recoverable.

From Tillamook: GEORGE R. BAGLEY, Judge.

In Banc. Statement by MR. JUSTICE BENSON.

This is an action by John Theiler against Tillamook County, for damages which plaintiff alleges resulted

*For cases passing on the question of measure of damages against municipality for injury to land by surface water, see note in 65 L. R. A. 284. REPORTER.

to his land by reason of the fact that the county constructed a bridge and culvert across a highway upon his premises in such a manner as to divert the waters of Munson Creek into a different channel, thereby damaging the soil.

Defendant's answer consists of denials. A trial being had, the jury returned a verdict for defendant, and, judgment being entered thereon, plaintiff appeals.

Submitted on briefs under the proviso of Supreme Court Rule 18: 117 Pac. xi.

AFFIRMED.

For appellant *Mr. Sidney S. Johnson* submitted a brief over his name.

For respondent there was a brief presented by *Mr. H. T. Botts* and *Mr. T. H. Goyne*, District Attorney.

MR. JUSTICE BENSON delivered the opinion of the court.

1, 2. There is but one question to be considered, and that is the action of the trial court in giving the following instruction:

“But you have a right to take into consideration any consequential damages. That is any damage that occurred from time to time continually by reason of the existence of the bridge, culvert and fill in their present location, provided you find that has been the proximate cause of the injury and the continuing damage. But you must also, if you find from the evidence that the plaintiff has not exercised reasonable and ordinary diligence in protecting himself against the continuing damage, eliminate the consequential or additional or continuing damage which he might have suffered, provided you find that he could by the exercise of reasonable diligence and expenditure of a

reasonable sum of money have prevented any further or additional damage to his premises after the first damage has occurred. In explanation of that: If the water rushed through there, and he knew nothing about it, and did not expect it, and could not expect it, and his land was damaged by high water in consequence of the construction of this bridge, fill and culvert, then after that, if he could by exercise of reasonable diligence and expenditure of a reasonable sum of money prevent it, and did not do that, then he cannot recover for the continuing damage occurring after the original damage; that is to say, if he by his carelessness allowed the damage to be augmented and increase the loss, it falls upon himself, and prevents the recovery of additional damages from the county."

Plaintiff contends that this is error, for the reason that it submits to the jury an issue of contributory negligence when there is nothing of the sort pleaded in the answer. If counsel were correct in his contention that this instruction discusses the question of contributory negligence, his position would be unassailable, and his citations of authority would be apropos: but he misconceives the true meaning of the phrase "contributory negligence," which has been well defined to be "such an act or omission on the part of plaintiff amounting to an ordinary want of care as, concurring or co-operating with the negligent act of defendant, is the proximate cause or occasion of the injury complained of." There is nothing in the instruction which bears any relation to such a state of facts. On the contrary, it relates exclusively to continuing damages arising after the commission of the alleged wrongful act; it does not preclude the plaintiff from recovering, but advises the jury as to conditions under which the damages should be mitigated. As is well said in *City of Waxahachie v. Connor* (Tex. Civ. App.), 35 S. W. 692:

“Where the consequences of defendant’s negligence have subsequently been aggravated by the want of ordinary care, or by the neglect of the plaintiff, this may go in mitigation of damages, but it cannot defeat plaintiff’s right to recover for the wrongs for which the defendant is responsible. * * It seems upon principle and from the authorities cited that the aggravation of the injury by such neglect is simply evidence which goes to lessen or mitigate the damages. No case can be found holding that it is necessary for the defendant to plead such evidence in order to avail himself of it.”

The rule applicable to this case is quite clearly stated in 1 Sedgwick on Damages (8 ed.), Section 204, which says:

“The application of the doctrine of contributory negligence and of that of avoidable consequences often produce results that closely resemble each other; but there is a distinction between the two. Contributory negligence defeats the action itself. The rule of avoidable consequences can never produce this result, as it cannot be applied until a cause of action, which in any event will entitle the party injured to nominal damages, has arisen. (b) The rule therefore is really a rule of limitation upon the plaintiff’s recovery. Nor is it properly to be regarded as a species of mitigation of damages. This relates to the defendant, and generally to the character of his acts; e. g., that a tort was not malicious; that, after committing a trespass, he repaired the wrong as far as possible. But a reduction of the plaintiff’s damages by any such particulars as flow from his own imprudent act, or omission to act after the wrong has been committed, constitute a distinct class of remote damages in the strict sense of the word; of damages which flow from the illegal act, but for which the law gives no redress.”

We conclude, therefore, that there is no error in the instruction of which complaint is made, and the judgment is affirmed.

AFFIRMED.

MR. JUSTICE EAKIN absent.

Argued July 6, affirmed July 25, 1916.

LONG v. MINTO, WARDEN OF PENITENTIARY.

(158 Pac. 805.)

Habeas Corpus—Right to Bring—Lawfully Imprisoned Convicts.

1. Under Sections 627, 628, 631, 641, L. O. L., abolishing every other writ of *habeas corpus* than the writ of *habeas corpus ad subjiciendum*, and excluding persons imprisoned or restrained by virtue of the judgment of a competent tribunal of criminal jurisdiction from the right to prosecute such writ, the writ cannot be used to determine whether a person lawfully confined in the penitentiary is entitled to talk privately with an attorney, but such right, if it exists, must be asserted in some other proceeding.

Criminal Law—Commitment—Signing by Judge.

2. Since Sections 582, 584, 591, 1578, 1593, 1594, L. O. L., relating to journal of Circuit Courts and commitment of convicted prisoner, do not direct the circuit judge to sign the journal or the commitment, he is not required to do so to render a commitment legal.

Criminal Law—Judgments—Form—Oral.

3. A judgment is given by the act of the court in pronouncing sentence upon a person convicted of a crime.

[As to effect of judgments in criminal cases as *res judicata*, see note in 103 Am. St. Rep. 418.]

Criminal Law—Judgments—Memorial.

4. A memorial of the court's judgment is made when the clerk under Section 1578, L. O. L., performs the ministerial act of writing the entry in the journal.

Habeas Corpus—Petition for Writ—Form.

5. Writ of *habeas corpus* will not issue where the petition does not conform to the requirements of Section 630, L. O. L., as to contents of petition for writ.

From Marion: WILLIAM GALLOWAY, Judge.

Department 2. Statement by MR. JUSTICE HARRIS.

Upon the petition of Tom Garland, an attorney acting for A. M. Long, the circuit judge allowed a writ of *habeas corpus*. The petition alleges that Long is unlawfully imprisoned, and that "the illegality thereof consists of" a demand made by the petitioner upon the deputy warden, who was in charge of the penitentiary in the absence of the warden, and a refusal of the dep-

uty warden to allow Long to have "a private interview within said penitentiary with his attorney Tom Garland, stating at said time he did not object to the presence of a guard or other official or the use of a fine wire mesh screen, but provided, however, that the said officer or guard be not close enough to hear what was said between said A. M. Long and his said attorney." Continuing, the petition recites:

"That said warden or deputy warden, acting as warden and said board of control, were informed that said private interview, as above set forth, was for the necessary protection and welfare of said A. M. Long and was for no unlawful or illegal purpose. That the aforesaid refusal to allow a private interview with his attorney is an illegal restraint of the liberty of said A. M. Long. * * Your petitioner further alleges that such imprisonment and restraint is not by virtue of any order, judgment, decree, or process of any court. * * "

The petition concludes with a prayer that A. M. Long "may be restored to his liberty and from the restraint imposed upon him in this particular, to wit, so far that he may have a private interview with his attorney Tom Garland."

The return to the writ shows that A. M. Long has been confined in the penitentiary since December 30, 1914, pursuant to a judgment rendered in the Circuit Court for Multnomah County adjudging him guilty of the crime of larceny in a dwelling-house and sentencing him to imprisonment in the penitentiary for an indeterminate period of not less than one year nor more than seven years. A copy of the commitment held by the warden is annexed to the return. The return recites three rules promulgated by the board of control. These rules require the warden to see that persons, who may have business about the prison, have

no communication of any kind with any prisoner, "except by authority and in the presence of an officer"; and visitors must be accompanied by an officer or employee of the prison while visiting within the cell-houses or within the walls of the prison. The return contains other averments not material here, and then concludes by alleging that:

"All confidential communications between the prisoners and attorneys in the presence of any officer or guard are deemed and treated as privileged communications."

The replication admits that the warden holds the paper which the answer recites as the commitment, but the petitioner assails the commitment by alleging that the paper is illegal, for the reason that the circuit judge never signed any judgment or order of commitment.

The trial court sustained a demurrer "to the new matter contained in the reply," and, "said A. M. Long having elected to stand upon said writ of *habeas corpus* allowed and the reply made to the return," a final judgment was rendered dismissing the proceeding, and the petitioner then appealed. AFFIRMED.

For appellant there was a brief and an oral argument by *Mr. Thomas L. Garland*.

For respondent there was a brief and an oral argument by *Mr. George M. Brown*, Attorney General.

MR. JUSTICE HARRIS delivered the opinion of the court.

1. Both the allowance of the writ of *habeas corpus* and the procedure governing its prosecution are regulated by statute. We read in Section 627, L. O. L., that

“the writ of *habeas corpus ad subjiciendum* is the writ herein designated, and every other writ of *habeas corpus* is abolished”; and the same section expressly states that every person imprisoned or restrained of his liberty, “except in the cases specified in the next section, may prosecute a writ of *habeas corpus* according to the provisions of this chapter, to inquire into the cause of such imprisonment or restraint, and if illegal, to be delivered therefrom.” The next provision of the Code (Section 628, L. O. L.) states that:

“The following persons shall not be allowed to prosecute the writ: * * (2) Persons imprisoned or restrained by virtue of the judgment * * of a competent tribunal of * * criminal jurisdiction. * * ”

The exception specified by Section 628 is further emphasized in Section 631, L. O. L., where we find that upon the filing of a proper petition the writ must be allowed without delay, “unless it appears from the petition itself, or from the documents annexed thereto, that the person for whose relief it is intended is by the provisions of this chapter prohibited from prosecuting the writ.” And, finally, Section 641, L. O. L., provides that:

“It shall be the duty of the court or judge forthwith to remand such party if it shall appear that he is legally detained in custody: * * (2) By virtue of the judgment * * of any competent court * * of criminal jurisdiction. * * ”

All forms of the writ of *habeas corpus* have been abolished by statute, except the single one named in Section 627. The allowance of the writ and its prosecution are regulated by statute. The right to prosecute the writ is open to any person whose liberty is restrained if he is not imprisoned or restrained by a judgment of a competent court of criminal jurisdiction.

If it appears from the writ that the person is one of those excluded by the statute, then the writ cannot be allowed; or, if the court subsequently finds that the person for whose relief the writ is intended is one of those who are prohibited from prosecuting the writ, then the proceeding must be dismissed and the party remanded.

2-5. The return to the writ contains a copy of the paper which has been called the commitment. The replication admits that the warden holds the commitment, but the petitioner claims that it is not a legal commitment, because neither the journal of the Circuit Court where the judgment was rendered nor the commitment itself was signed by the circuit judge. The petitioner, however, cannot successfully maintain his contention. The judge is not required to sign the journal of the Circuit Court, nor is it his duty to sign the commitment. The records of the Circuit Court include a journal: Section 582, L. O. L. The "journal" is defined by Section 584, L. O. L., as a book "wherein the clerk shall enter the proceedings of the court during term time, and such proceedings in vacation as this Code specially directs." Section 591, L. O. L., makes the clerk the custodian of the records and files of the court. A judgment is given by the act of the court in pronouncing sentence upon a person convicted of a crime, and when the judgment is given "the clerk must enter the same in the journal, stating briefly the crime for which the conviction has been had * * ": Section 1578, L. O. L. The authority for the execution of a judgment like the one involved here is likewise found in the Code. Section 1593, L. O. L., provides that:

"When a judgment, except of death, has been pronounced, certified copy of the entry thereof upon the journal must be forthwith furnished by the clerk to

the officer whose duty it is to execute the judgment; and no other warrant or authority is necessary to justify or require its execution.”

We read in Section 1594, L. O. L., that:

“When the judgment is imprisonment in the penitentiary, the sheriff must deliver the body of the defendant, together with a copy of the entry of judgment, to the keeper of such prison.”

The judgment is rendered when the judge performs the judicial act of pronouncing sentence, and a memorial of that judgment is made when the clerk performs the ministerial act of writing the entry in the journal: 23 Cyc. 835. The judge does his duty when he renders the judgment. The clerk discharges his duty when he enters the judgment in the journal. Having entered the judgment, the clerk gives a certified copy of the entry to the sheriff, who then delivers the body of the defendant, “together with a copy of the entry of judgment, to the keeper of such prison.” Every step required by statute was taken from the time of the conviction until the delivery to the keeper of the prison. There is no statute directing the circuit judge to sign the journal or the commitment, and, in the absence of such a statute, he is not required to sign the journal or the commitment; and therefore the Circuit Court ruled correctly in sustaining the demurrer to the new matter in the replication: 23 Cyc. 850. The commitment in the hands of the warden is supported by an active and operating judgment of a competent court of criminal jurisdiction, and consequently A. M. Long is a person who, in the plain and unambiguous language of Section 628, L. O. L., “shall not be allowed to prosecute the writ.” Moreover, the writ should not have been allowed because on no theory does the petition comply with Section 630, L. O. L.

The writ of *habeas corpus* cannot be used to determine whether a person who is lawfully confined in the penitentiary is entitled to talk privately with an attorney. If a convict when in prison has the right claimed by the petitioner, it cannot be enforced by a writ of *habeas corpus*, but must be asserted in some other proceeding.

The judgment of the Circuit Court is affirmed.

AFFIRMED.

MR. CHIEF JUSTICE MOORE, MR. JUSTICE McBRIDE and MR. JUSTICE BEAN concur.

Argued June 27, affirmed July 25, 1916.

NOLAN v. COOK.

(159 Pac. 810.)

Boundaries—Determination—Decree—Title to Land.

1. In a suit ostensibly to establish a division line, but in fact to establish title to a strip of land near the boundary, the court had power to decree that the plaintiff had no title to the strip, and that the defendant was the owner thereof, rather than merely to dismiss the suit.

[As to suits to ascertain and declare boundaries, see note in 119 Am. St. Rep. 66.]

Boundaries—Equity—Jurisdiction—Title to Land.

2. Equity has no jurisdiction to say which of two lines is meant by a description in a deed, for this would be determining the title to land.

Equity—Remedy at Law—Title to Land.

3. Equity has no jurisdiction to settle titles, since one claiming title is entitled to a jury trial, and the remedy at law is complete.

Boundaries—Purchase of Disputed Title—Suits Involving Title.

4. No one can snoop among the deed records, find and buy a lawsuit involving realty, and expect a court of equity to award him a title under guise of settling a disputed boundary.

From Multnomah: CALVIN U. GANTENBEIN, Judge.

Department 1. Statement by MR. JUSTICE BURNETT.

This is a suit by A. E. Nolan against Vincent Cook and Frank L. Bunting, to establish a division line between realty alleged to be owned by the plaintiff and another tract said to belong to the defendants. The former states, in substance, that he is the owner in fee simple of a parcel of land lying south of and abutting upon what he avers is the division line between the wife's half and husband's half of the donation land claim of John B. Talbot and Sarah M. Talbot, his wife. He says the defendants own an adjoining tract on the north of that line; and that there is a dispute between the parties litigant concerning the location of the common boundary. He describes what he alleges is the division line of the Talbot claim, and prays for a decree establishing it as the common boundary between his and the defendants' holdings.

The other defendant did not appear, but the defendant Cook answering for himself, denies that the plaintiff is the owner of the property which he claims, and asserts ownership of the same in himself. He denies that the property, title to which is asserted by the plaintiff, is south of the division line in the Talbot donation, and alleges that it is all north of that boundary. He then traces title to himself by mesne conveyances from the government donees to the land claimed by the plaintiff, and alleges certain facts which he maintains should estop the latter from asking any relief in this suit. The reply admits certain portions of the answer and traverses others. The Circuit Court heard the case on the merits, made findings of fact and conclusions of law, and decreed as follows:

“That the plaintiff is not the owner in fee simple or otherwise, and has no right, title or interest in or to any part of the real property described in paragraph

I of plaintiff's complaint herein. * * And it is further considered, adjudged, and decreed that the defendant Vincent Cook is the owner in fee simple of the above-described premises. It is further considered, adjudged and decreed that the plaintiff is not entitled to any relief herein, and that the defendant Vincent Cook have and recover of and from the plaintiff A. E. Nolan, his costs and disbursements herein taxed and allowed."

The plaintiff appeals.

AFFIRMED.

For appellant there was a brief over the names of *Mr. B. J. Rowland* and *Mr. Oak Nolan*, with an oral argument by *Mr. Rowland*.

For respondents there was a brief over the names of *Messrs. Clark, Skulason & Clark* and *Mr. J. H. Middleton*, with an oral argument by *Mr. Alfred E. Clark*.

MR. JUSTICE BURNETT delivered the opinion of the court.

The burden of the plaintiff's contention here is that the court erred in deciding that Cook, and not Nolan, is the owner of the land involved, and that all which rightly could have been done in any event was to enter a decree dismissing the suit.

1-4. The dispute disclosed is about the location of the division line of the Talbot claim so far as the same is a boundary. The defendant contends that it is coincident with the line running east and west through the quarter-section corner common to sections 8 and 9 in township 1 south, range 1 east, Willamette Meridian, while the plaintiff maintains that it is north of that government line and substantially parallel with it. It seems that plaintiff deraigns title through quitclaim deeds from parties who conveyed to

his predecessor in interest the land lying between those two lines. In order to qualify himself as a litigant in a suit to settle a disputed boundary, it was necessary for the plaintiff to allege that he was the owner of land bounded by the controverted line. It was proper for the defendant to deny this averment, and thus the title of the plaintiff was made the subject of a subsidiary issue in the case. If he had no title to any land abutting upon the line in question, he had no cause of suit. Therefore it was competent for the court to pass upon this issue, and to adjudicate it at least for the purposes of this case.

As taught in *Miner v. Caples*, 23 Or. 303 (31 Pac. 655), equity has no jurisdiction to say which of two lines is meant by a description in a deed, for this would be determining the title to the land between them. It is because a party seeking to recover land or defending against an attempt to recover it is entitled to a jury trial that equity has no jurisdiction to settle titles, the remedy at law being complete in such instances. This is well settled by such cases as *Love v. Morrill*, 19 Or. 545 (24 Pac. 916), and the numerous others decided following that precedent. No one can snoop among the deed records, find and buy a lawsuit involving realty, and expect a court of equity to award him a title under guise of settling a disputed boundary.

Really, the effect of the plaintiff's appeal is to call upon us to construe the decree rendered and to declare the extent to which it binds the parties. All we say on this point is that for the purposes of this suit it was regular for the court to decide the issue presented as to the title of the plaintiff, and consequently his right to maintain the suit. There is evidence in the record which justified the decision of the Circuit

Court. It will be time enough for us to determine its effect upon the title when the question shall arise.

The decree of the Circuit Court is affirmed.

AFFIRMED.

MR. CHIEF JUSTICE MOORE, MR. JUSTICE McBRIDE and MR. JUSTICE BENSON concur.

Argued July 11, affirmed July 25, 1916.

FARGO v. WADE.

(159 Pac. 624.)

Vendor and Purchaser—Damages—Remote and Uncertain.

1. Injury to F., given an option on land by E. subject to lease given by E. to H., by reason of H. not breaking the sod, is not the direct and necessary result of E. not furnishing a man to assist H. in farming, as required by the lease, but is remote and uncertain; the lease merely providing that H. shall break so much of the sod ground "as he can, weather conditions and other conditions considered."

[As to effect on rights of parties under option contract of purchase of injury to or destruction of premises, see note in *Ann. Cas.* 1913A, 1295.]

From Multnomah: T. E. J. DUFFY, Judge.

Department 1. Statement by MR. JUSTICE BURNETT.

This is an action by George E. Fargo and C. A. Baker against W. T. Wade to recover one installment of \$250 alleged to be due on an option contract executed January 3, 1910, whereby the predecessor in title of the plaintiffs granted to the defendant the option of purchasing some land in Wallowa County, in consideration that he would pay certain amounts annually for the privilege extended. This chose in action was assigned to the plaintiffs. The making of the option contract is admitted, together with its assignment to the plaintiffs. Otherwise the complaint is

denied, except as stated in the further and separate answer. The defendant alleges that at the time the contract was made the land was under lease to C. W. Harvey for five years, one of the terms of which demise was that Ewing "is to furnish a man for eight months during each year to assist party of the second part in farming said place and, in the event of not furnishing said man, to pay party of the second part a sum equal to the wages of a farm hand for said period of time during each year. The party of the second part [Harvey] is to break out each year so much of the sod ground on said place as he can, weather conditions and other conditions considered, and plant the same to crops on same conditions as other land is farmed."

The answer is further to the effect that the plaintiffs bought from Ewing the land and the chose in action under the option contract, and covenanted with him to keep and perform all the terms of the lease to Harvey. The defendant avers in conclusion that both Ewing and the plaintiffs failed to furnish the man or pay his wages at any time; that in consequence thereof Harvey did not plow any new ground and, accordingly, the land was rendered less valuable, so that he suffered damage in the sum of \$5,124, for which he demands judgment.

The new matter in the answer is traversed by the reply. The court refused to allow testimony about the condition of the land and whether the sod had been broken or not, and generally refused proof of the allegations of the answer in connection with that stipulation in the lease. From a judgment for the plaintiffs, the defendant appeals. AFFIRMED.

For appellant there was a brief and an oral argument by *Mr. Leroy Lomax*.

For respondents there was a brief and an oral argument by *Mr. Charles A. Hart*.

1. In order to recover damages the injury for which compensation is desired by a plaintiff must be the natural, direct and necessary result of the alleged wrongful act or omission of the defendant: 13 Cyc. 25. If we could say that the breaking of new sod would have been the ordinary and normal consequence of furnishing the laborer to Harvey or paying him the money instead, then, if there were no further factors to consider, the conclusion would follow that the shortcoming of Ewing and the plaintiffs in failing to keep the covenant of the lease in that respect constitutes a basis upon which to recover damages. But, in the first place, Harvey only stipulated "to break out each year so much of the sod ground on said place as he can, weather conditions and other conditions considered." Nothing is stated in the answer showing that the weather and other conditions, whatever they may have been, were favorable to plowing sod, or that Harvey had the present ability or inclination to perform the labor. The lease does not specify that the hand to be furnished was for the purpose of breaking new land. Indeed, that document almost, if not quite, leaves the cultivation of the farm to the discretion and inclination of Harvey. With perfect propriety he could have employed both himself and the laborer at other work. Under such conditions, damage to the defendant is not the necessary result of failing to furnish the hand to assist the tenant in farming. The injury, if any, is too remote from any act or default of Ewing or the plaintiffs. The provisos involved are numerous, and did not operate together or in succession so as to make a continuous sequence between the alleged fault of the plaintiffs and the stated damage to the defendant.

If plaintiffs had procured the laborer; if the weather conditions had been favorable; if Harvey had been willing to plow the sod; if he had set the hired man at that work; if he had done a good job of plowing; if he had plowed more or less, are diverse considerations not related to nor acting with each other, and render the possibility of damage to the defendant so remote and uncertain that he cannot interpose it as a counter-claim against a demand which he might have avoided at any time by surrendering his option, as we held in the former case: *Fargo v. Wade*, 72 Or. 477 (142 Pac. 830, L. R. A. 1915A, 271).

The judgment is affirmed.

AFFIRMED.

MR. CHIEF JUSTICE MOORE, MR. JUSTICE McBRIDE
and MR. JUSTICE BENSON concur.

Argued July 19, modified August 1, 1916.

FINLEY v. MARION COUNTY.

(159 Pac. 557.)

Infants—Mother's Pension—Presence of Mother at Home.

1. Under Laws of 1913, page 75, providing in Section 1 for a mother's pension for the support of herself and of her child or children, and Section 5, providing it is the intent of the act to keep the children to which it is applicable together under the control of their mother, and that the mother shall make a home for the children, a mother did not forfeit her right to a pension by working away from the family residence some hours of the day, if such labor was necessary to contribute to their subsistence.

Infants—Mother's Pension—Date of Accrual of Right to Pension.

2. Under such act, an applicant's right to pension accrued from the date of her application in proper form.

Infants—Mother's Pension—Power of County Court Sitting as Juvenile Court.

3. Under the terms of such act, the County Court, sitting as a Juvenile Court, can grant no other relief than that provided for in the act.

Infants—Mother's Pension—Repeal.

4. The passage of the amendatory Mother's Pension Act of 1915 (Laws 1915, p. 97) did not repeal any provisions of the Mother's Pension Act of 1913 (Laws 1913, p. 75) so as to affect an amount then due and accrued under the act of 1913, although no action on application therefor was taken until after enactment of 1915 act.

Infants—Mother's Pension Act—Repeal—Vested Rights.

5. No person disqualified by the 1915 amendatory Mother's Pension Act (Laws 1915, p. 97) is entitled to have her pension continued after that law went into effect.

From Marion: WILLIAM GALLOWAY, Judge.

In Banc. Statement PER CURIAM.

These are cross-appeals from the decision of the Circuit Court of Marion County in the matter of an application of Mary Luella Finley for a pension under the Mother's Pension Act, Chapter 42, Session Laws of 1913. In July, 1913, the petitioner filed her application in due form, setting forth the fact that her husband was wholly incapable of supporting her or her son, then about eight years of age. The petition was in regular form, and stated all the facts required by statute. Being of the opinion that the petitioner was not entitled to the relief sought, by reason of the fact that she was at work which kept her away from home much of the time during the day, and for other causes not necessary to mention here, the County Court took no action on the petition until July 30, 1915, when it entered an order denying the same. At various times, however, the County Court extended financial assistance under the provisions of the pauper statutes. The petitioner appealed from the decision of the County Court denying her application and, upon the hearing of the appeal in the Circuit Court, the latter found that she was entitled to a mother's pension as prayed for in her petition, but held that she was guilty of laches in not compelling the Juvenile Court to act upon

it at an earlier date, and allowed her compensation only from July 30, 1915. MODIFIED.

For appellant there was a brief with oral arguments by *Mr. Walter L. Tooze, Jr.*, and *Mr. Glenn O. Holman*.

For respondent there was a brief over the names of *Mr. George G. Bingham* and *Mr. Ernest R. Ringo*, District Attorney, with an oral argument by *Mr. Bingham*.

Opinion PER CURIAM.

1. We are of the opinion that under the act of 1913 a mother was not required to be with her family all the time if she kept them together in the home, and that she did not forfeit her right to a pension by working away from the family residence at some hours of the day if such labor were necessary to contribute to their subsistence.

2. To the first question propounded in respondent's brief we therefore answer that under the act of 1913 the petitioner was entitled to a pension of \$10 a month from the date of her application.

3. The second question asked is "whether, under the terms of the act of 1913, the County Court sitting as a Juvenile Court can grant relief other than the relief provided for in the act."

To this we answer, "No."

4, 5. The third question proposed in the brief of the attorney for the county is this:

"The applications having been filed during the month of June, 1913, and no action being taken to cause a record to be made until the month of August, 1915, and after the amendatory act went into effect, had the Juvenile Court authority to grant relief excepting under the conditions specified in Section 3 of the amendatory act of 1915?"

To this we reply that in our opinion it was not the intent of the act of 1915 to repeal any provisions of the act of 1913 so as to affect amounts then due which should have been allowed in the regular course of proceedings under the act of 1913, and that as to sums accrued before the act of 1915 went into effect, they should be allowed in full. Subject to this exception no person who is disqualified under the law of 1915 is entitled to receive a pension, and pensions to persons falling in this class should be discontinued after the date that the act of 1915 went into effect: *United States v. Teller*, 107 U. S. 64 (27 L. Ed. 352, 2 Sup. Ct. Rep. 39); *Eddy v. Morgan*, 216 Ill. 449 (75 N. E. 174).

The judgment of the Circuit Court will be modified to conform to this opinion. **MODIFIED.**

Argued July 19, modified August 1, 1916.

WOLFE v. MARION COUNTY.

(159 Pac. 558.)

From Marion: WILLIAM GALLOWAY, Judge.

In Banc. Statement PER CURIAM.

This is an application by Eva Maud Wolfe for a widow's pension, opposed by county of Marion of State of Oregon, from the judgment rendered, applicant appeals. **MODIFIED.**

For appellant there was a brief with oral arguments by *Mr. Walter L. Tooze, Jr.*, and *Mr. Glenn O. Holman*.

For respondent there was a brief over the names of *Mr. George G. Bingham* and *Mr. Ernest R. Ringo*, District Attorney, with an oral argument by *Mr. Bingham*.

Opinion PER CURIAM.

This case is similar in all respects to the case of *Finley v. Marion County*, ante, p. 294 (159 Pac. 557), and will take the same course. **MODIFIED.**

Writ of *habeas corpus* allowed August 1, petitioner discharged August 2, 1916.

IN RE LEVEL.
(159 Pac. 558.)

Execution—Execution Against Person.

1. Where the pleadings in an action for the recovery of money disclose no fraudulent actions on the part of defendant, his imprisonment under an execution against his person is unlawful.

Reference—Authority of Referee—Findings of Fact and Conclusions of Law.

2. Under section 838, L. O. L., a referee in an equitable proceeding has no authority to make findings of fact or conclusions of law.

Execution—Imprisonment Under Execution Against Person—When Authorized.

3. The imprisonment of petitioner, by virtue of an execution under a decree finding that he fraudulently and unlawfully retained money belonging to another, rendered on unauthorized findings of fact and conclusions of law by the referee, no other evidence being received and the decree not being based on any issue found in the pleadings, is unlawful, and petitioner is entitled to release in *habeas corpus* proceedings.

Original proceeding in Supreme Court.

Mr. William P. Lord, for petitioner.

Mr. Walter H. Evans, District Attorney, *Mr. Arthur A. Murphy*, Deputy District Attorney, *Mr. James N. Davis* and *Mr. William W. Dugan, Jr.*, for the respondent, Sheriff of Multnomah County, Oregon.

Allowed August 2, 1916.

ON RULE TO SHOW CAUSE.

Opinion PER CURIAM.

In response to an order made by Mr. Justice BEAN, requiring the sheriff of Multnomah County to show cause why a writ of *habeas corpus* should not issue for the purpose of inquiring into and determining the legality of the detention by said sheriff of the petitioner, James M. Level, the parties concerned have been heard by this court, and without discussion of the merits we are of the opinion that a *prima facie* case has been made by the petitioner sufficient to authorize the issuance of the writ. It will therefore be issued according to the prayer of the petition.

WRIT ALLOWED.

Petitioner discharged August 2, 1916.

ON THE MERITS.

Department 1. Statement by MR. JUSTICE BENSON.

On December 19, 1912, John M. Level began an action against the petitioner and his wife for the recovery of moneys, and thereafter the defendants therein filed their answer and, at the same time, a cross-bill in equity, to which John M. Level filed an answer, wherein, after certain admissions and denials, he pleads affirmatively as follows:

“For the further and separate answer to the cross-bill the defendant alleges that the money as set out in the complaint and the cross-bill was delivered to the plaintiff herein James M. Level, and that thereafter the said James M. Level and Lucy Level, his wife,

and plaintiffs in said cross-bill, agreed in the State of Washington, where the James M. Level had his residence at that time, and under the laws of Washington said property delivered to him is community property, that if the defendant would let him use some of the money on hand, they would repay it all to him, whereupon the plaintiff of the cross-bill James M. Level did expend for improvements on the property of Lucy Level, and for her benefit, a large portion of said money, all of which she agreed to repay to John M. Level, the exact amount of which the defendant does not know, but asks that the same be ascertained; that during the month of May, 1911, the plaintiffs James M. Level and Lucy Level agreed to convey to this defendant the northwest quarter of northwest quarter, section 24, township 5 north, range 3 east, of Willamette Meridian, situated in Clarke County, Washington, for the sum of \$600, which money was out of the money which had been paid to James M. Level, and this defendant further alleges that he went into possession of said property and put improvements thereon under the understanding and belief that the plaintiffs herein had good title thereto, or would acquire the same, but defendant, on or about the first day of March, 1912, discovered that the title to said property remained in the name of the man who had lost his life in Portland by fire, by accident, and that the said James M. Level and Lucy Level had no title to said property, and do not have the title to said property at this time.

“The defendant further alleges that James M. Level used a portion of the money turned over to him by this defendant for improvements on a homestead in the vicinity of the land above described, and that all of the money received by this defendant from said James M. Level was the sum of \$551.50, leaving a balance due to John M. Level of \$2,219.60.

“Wherefore the defendant prays for an accounting with the said plaintiffs, and for proof that the said James M. Level and Lucy Level have a title to the property described herein, to wit: Northwest quarter of the northwest quarter, section 24, township 5

north, range 3 east, of Willamette Meridian, situated in Clarke County, Washington; and that with such proof there be delivered to this defendant a conveyance thereof if the court finds such proof of title to be sufficient; and that all the moneys received by the said plaintiffs shall be decreed to be community property, and for such other and further relief as may seem meet and proper under the principle of justice and equity.”

A reply being filed, the trial court referred the cause to a referee to take the testimony “and decide the whole issue, and report upon the questions involved to the court within 15 days from this date.”

Thereafter the court made and entered its decree, from which the following quotation is the part pertinent to the matter here presented:

“ * * The cause was submitted to the referee for consideration and decision, and after due deliberation thereon, the referee, duly and regularly empowered and appointed, files his findings of fact and conclusions of law, wherein it appears to the court that the defendant James M. Level received from John M. Level, the plaintiff, a sum total of \$3,269.17, in trust for the benefit of John M. Level, and that the said defendant James M. Level expended for the use and benefit of the said John M. Level the sum of \$2,225.68, leaving a balance of the said trust funds still in the hands of James M. Level amounting to \$1,043.49; and, no objections having been filed to said report, nor motion to set aside, wherefore, by reason of the law and the findings as aforesaid, it is hereby ordered, adjudged, and decreed that the said John M. Level have and recover from the defendant James M. Level the sum of \$1,043.49, together with costs and disbursements in this suit incurred taxed at — dollars; and it is further decreed that the said judgment be for money fraudulently and unlawfully retained by said James M. Level, and that execution be forthwith issued therein.”

Thereafter an execution was issued against the person of the petitioner, and he, being imprisoned thereunder, presents his petition to this court for a writ of *habeas corpus*.
PETITIONER DISCHARGED.

For petitioner there was a brief and an oral argument by *Mr. William P. Lord*.

For respondent, T. M. Hurlburt, Sheriff, there was a brief over the names of *Mr. Walter H. Evans*, District Attorney, *Mr. Arthur A. Murphy*, Deputy District Attorney, *Mr. James N. Davis* and *Mr. William W. Dugan, Jr.*, with oral arguments by *Mr. Murphy* and *Mr. Davis*.

MR. JUSTICE BENSON delivered the opinion of the court.

1. There are two grounds upon which it must be conceded that the imprisonment of the petitioner is wrongful: (1) A careful reading of the answer to the cross-bill discloses no fraudulent actions upon the part of the plaintiff, and therefore the cause is not one in which the severe remedy of an execution against the person may be invoked; (2) it will be observed that the decree is based exclusively upon the findings and decisions of the referee.

2, 3. The statute in this state has taken away from a referee the authority to make findings of fact and conclusions of law in an equitable proceeding: Section 838, L. O. L.; *Anthony v. Hillsboro Gold Min. Co.*, 58 Or. 258 (113 Pac. 442, 114 Pac. 95). It is true that under the authority last cited the court might adopt the findings and conclusions so made as its own, nevertheless its decree must be based upon the evidence and not upon unauthorized findings. The recital in the decree that "the said judgment be for money fraudu-

lently and unlawfully retained by James M. Level'' is not based upon any issue found in the pleadings. From these conclusions it follows that the decree is void and the imprisonment of petitioner unlawful. An order will be entered, discharging him from custody.

PETITIONER DISCHARGED.

MR. CHIEF JUSTICE MOORE, MR. JUSTICE BEAN and MR. JUSTICE MCBRIDE concur.

Argued July 14, modified August 1, 1916.

MEADOW VALLEY LAND CO. v. MANERUD.

(159 Pac. 559.)

Setoff and Counterclaim—Pleading—Sufficiency.

1. In an action on a promissory note, an answer alleging that defendant leased a horse to plaintiff, which was injured and died through plaintiff's want of care, *held* to state a counterclaim on contract, not on tort, under Section 74, L. O. L.

[As to demands which will support claims for setoff, see note in 12 Am. Dec. 152.]

Appeal and Error—Review—Harmless Error.

2. In an action on promissory notes, the failure of defendant to properly plead a counterclaim for the value of a horse leased to plaintiff and which died through want of proper care, *held* not to require reversal under Article VII, Section 3 of the Constitution, of judgment allowing such counterclaim.

Pleading—Setoff and Counterclaim—Sufficiency.

3. In an action on a promissory note, a counterclaim alleging that notes were procured by false representations, but not alleging that plaintiff's officer who made the false representations was then acting within the scope of his authority, *held* not to state a defense.

Bills and Notes—Actions—Amount of Recovery—Attorneys' Fees.

4. In an action on promissory notes, where, by the allowance of defendant's counterclaim, plaintiff had judgment for only \$48.77, the allowance of \$100 as attorneys' fees *held* unreasonable.

From Lane: GEORGE F. SKIPWORTH, Judge.

In Banc. Statement PER CURIAM.

This is an action by the Meadow Valley Land & Investment Company, a corporation, against Mrs. Olivia Manerud to recover the amount of a promissory note given by the defendant to the plaintiff March 20, 1911, for \$1,000, payable in one day, with interest at 8 per cent per annum, and providing for the recovery of a reasonable sum as attorneys' fees in case action were instituted on the note. The complaint avers that the plaintiff is a corporation; that the defendant executed to it the promissory note; that no part thereof has been paid; and that \$100 is a reasonable sum to be allowed as attorneys' fees.

The answer denies some of the allegations of the complaint, and for further defenses sets forth ten counterclaims, the first eight of which were allowed and are not controverted herein. The ninth defense, which was also sanctioned, substantially avers that the defendant leased to the plaintiff a horse which it stipulated properly to care for and return to her in good condition; that while the plaintiff was using the animal it was kicked by another horse; that instead of caring for the injured horse as it had agreed, the plaintiff continued to work the horse until December 13, 1913, when it died; and that the animal was worth \$300, no part of which has been paid.

The tenth counterclaim alleges in effect that the promissory note mentioned was given for 20 shares of the plaintiff's capital stock then held by I. P. Hower, who owed the corporation therefor a remainder of \$1,000; that before procuring this stock the defendant informed G. D. Linn, an officer of the plaintiff, of her contemplated purchases and inquired of him as to the kind and value of assets of the corporation, whereupon that agent detailed to her the character and

worth of the plaintiff's property, which representations were false, setting forth the particulars; that she believed these statements, and relying thereon negotiated for the purchase of the shares of stock, which principal fund of the corporation was of no value and in consequence thereof she had paid out on account of the stock so purchased \$1,961.10, setting forth the items thereof.

The reply put in issue the allegations of new matter in the answer. At the trial the defendant's counsel obtained an order to amend the answer so as to aver that the plaintiff had violated its contract to return the horse, the reasonable value of which was \$300, and that the corporation had appropriated the animal to its own use.

The court granted a nonsuit as to counterclaim numbered ten. In referring to the attorneys' fee as alleged in the complaint, the court told the jury that having heard the testimony on that subject, they should allow whatever sum therefor they considered reasonable. The defendant's counsel thereupon inquired:

"Suppose the jury should find these counterclaims equal to the note exclusive of attorneys' fees, should there be anything then? I claim there should not be anything brought in for attorneys' fees."

The court replied:

"I don't know whether you are entitled to that. I don't believe you are."

An exception to this ruling was taken. The jury by special verdict found that the value of the horse was \$300; that after crediting this sum and the amount of the first eight counterclaims there remained due on the note \$48.77; and that \$100 was a reasonable attorneys' fee. Judgment was rendered thereon against the defendant for \$148.77, from which she appeals,

asserting an error was committed in excluding her tenth counterclaim. The plaintiff also appeals from that part of the judgment which awarded any sum for the horse. MODIFIED.

For appellant there was a brief and an oral argument by *Mr. H. E. Slattery*.

For respondent there was a brief over the names of *Mr. L. M. Travis* and *Messrs. Williams & Bean*, with oral arguments by *Mr. Travis* and *Mr. John M. Williams*.

Opinion PER CURIAM.

1, 2. It is maintained by plaintiff's counsel that the part of the answer alleging the injury to and the death of the defendant's horse is an attempt to interpose a defense sounding in tort to an action founded upon a contract, and for that reason the facts thus set forth do not constitute a counterclaim within the meaning of that term as defined by statute: Section 74, L. O. L. The lease of the horse arose out of a contract, and though the facts stated in the answer relating thereto are not well averred, this part of the defense fairly constitutes a counterclaim; and, invoking Section 3 of Article VII of the Constitution, relating to such matters, the judgment in this particular should be approved.

3, 4. It is insisted by defendant's counsel that an error was committed in granting a judgment of nonsuit as to the tenth counterclaim. It is not averred in that part of the answer that the plaintiff's officer who made the alleged false representations was then acting within the scope of his authority or for the plaintiff. The facts thus set forth do not constitute a defense to the action, and no error was committed in the re-

spect mentioned. The court, however, should have instructed the jury as requested by the defendant as to the attorney's fee. To allow the sum of \$100 for collecting \$48.77 as the remainder due on a promissory note is certainly unreasonable, and, this being so, the judgment is modified to allow only \$25 as an attorney fee, and in all other respects affirmed.

MODIFIED AND AFFIRMED.

Argued July 12, affirmed August 1, 1916.

FIRST NAT. BANK v. PACIFIC TEL. & TEL. CO.

(159 Pac. 561.)

Telegraphs and Telephones—Compelling Connection Between Companies—Injunctive Relief.

1. Where a bank installed in its building a private intercommunicating telephone system, with its own instruments, with which the H. telephone company connected, the bank could not in suit against the P. telephone company, have injunctive relief to compel the latter to connect its system to the bank's thus effecting a connection of the two telephone systems, competitors, the H. company not being a party to the suit, until the Public Service Commission fully considered all questions involved; injunction being an extraordinary remedy, which will not be granted unless the Public Utilities Act (Laws 1911, p. 483) will work harmoniously as a result.

[As to power of state or Public Service Commission to compel public service corporations to make connections with each other, see note in *Ann. Cas.* 1915C, 850.]

From Linn: WILLIAM GALLOWAY, Judge.

Department 1. Statement by MR. JUSTICE BEAN.

This is a suit by the First National Bank of Albany, a corporation, against the Pacific Telephone & Telegraph Company, a corporation, and George E. Sanders, and was instituted for the purpose of permanently enjoining the defendants from disconnecting or in any manner interfering with or changing the present

telephone connection between the lines of the defendant telephone company and the telephone system owned and operated by the plaintiff in its banking institution existing in the City of Albany, Oregon. The Circuit Court rendered a decree dismissing the plaintiff's complaint, from which plaintiff appeals, assigning a number of errors.

Plaintiff is the owner of a five-story reinforced concrete building, the first floor of which is occupied by the plaintiff as a banking institution, the remainder of the building being used for office purposes. During the construction of the building in 1912-13, the plaintiff caused to be installed therein telephone conduits, and upon the completion thereof installed a complete telephone system connecting all the various offices in the bank and the offices of the First Savings Bank, another institution of the plaintiff situated in another building about one block distant, and also installed public stations therein for the use of its patrons. The telephone system can be operated from any station by means of an automatic keyboard, whereby direct connection is effected with the main switchboard. Upon the completion of the building the Home Telephone Company, a public service corporation and the owner of a competitive telephone system in the City of Albany, connected its trunk line with the main switchboard of the telephone system of plaintiff. About the same time the defendant company installed a telephone station in the bank building and afterward the defendant company's trunk line was, at the instance of plaintiff and without the consent of the defendant company, connected with one of the cables of plaintiff's telephone system, and thereby connection was made with the main switchboard of plaintiff's intercommunicating telephone system. All the incoming and out-

going telephone communications over both the Home and Pacific companies' lines were conducted by means of the instruments used by the plaintiff in its system as well as all intercommunications between various offices in the two banking institutions. Plaintiff occupied the building September 1, 1913. During that month the Pacific company objected to the connection which had been made with the plaintiff's intercommunicating system and the Home Telephone system, and informed the plaintiff that it would disconnect its service, whereupon plaintiff instituted this suit and obtained a temporary injunction restraining the defendant from so doing.

The Pacific company answered and affirmatively alleged that it undertakes to furnish telephone service by means of equipment owned, installed, and maintained by it without connection with the system of other telephone companies or with privately owned equipment. Temporary arrangements were made at the suggestion of the chairman of the Public Service Commission for service of the Pacific Telephone in the plaintiff's bank which was understood to be without prejudice to defendants' case. **AFFIRMED.**

For appellant there was a brief over the name of *Messrs. Schmitt & Schmitt*, with an oral argument by *Mr. G. G. Schmitt*.

For respondents there was a brief over the names of *Mr. Omar C. Spencer* and *Messrs. Carey & Kerr*, with an oral argument by *Mr. Spencer*.

MR. JUSTICE BEAN delivered the opinion of the court.

1. It not being shown by the record that the Pacific company voluntarily connected its system with plaintiff's intercommunicating system or the Home Tele-

phone system, the suit in effect is to compel the desired connection. The Pacific company asserts that it holds itself out to provide all the instrumentalities and facilities necessary and essential to the furnishing of telephone service. It is not engaged in furnishing service which consists of connecting privately owned equipment with its own instrumentalities and lines.

At the threshold of this case we are met by the contention of counsel for the Pacific company that the Circuit Court has no original jurisdiction over the regulation of public utilities such as the Pacific Telephone system; that the power of regulation is conferred upon the Public Service Commission by virtue of the Session Laws of 1911, page 483, known as the Public Utilities Act, which was passed by the legislative assembly and afterward ratified upon a referendum to the people.

Section 6 of this act provides as follows:

“The Railroad Commission of Oregon (now Public Service Commission) is vested with power and jurisdiction to supervise and regulate every public utility in this state, and to do all things necessary and convenient in the exercise of such power and jurisdiction.”

Section 54 of the act provides for a review of any order or procedure before the Public Service Commission by a suit in the Circuit Court of the county in which the hearing was held against the commission as defendant to vacate and set aside any such order or specified portion thereof on the ground that the order or portion thereof is unlawful. That right or recourse to the courts should be exercised within 90 days after the rendition of such order or determination. It is urged on behalf of the defendant company that this act provides a complete, adequate plan for the determination of all matters connected with the regulation

of public utilities; that the bank by this proceeding is endeavoring to make of the Circuit Court a body of equal original jurisdiction with the Public Service Commission, in such matters which has no sanction in law. We are referred to the case of *Ford v. Oregon Elec. Ry. Co.*, 60.Or. 278 (117 Pac. 809, Ann. Cas. 1914A, 280, 36 L. R. A. (N. S.) 358), where the plaintiff sought specific performance from the railway company, of a contract to stop local trains at a road crossing on the land of plaintiff. In the determination of the case we discussed the Railroad Commission Act and held that the regulation of the stopping of trains is a duty imposed in the first instance upon the railroad commission of the state under the provisions of Chapter 53, Laws of 1907, page 67, known as the Railroad Commission Act, Section 6875 et seq., L. O. L.; that under the present *régime*, if a court of equity should take cognizance in the first instance, regardless of the general plan of the railroad commission, it would doubtless tend to a confusion of results to the detriment of the public interests. Under the law the orders of the commission may be rescinded or amended from time to time according to change of conditions or requirements of necessity.

The Public Utilities Act further amplifies the general plan of regulation by the Public Service Commission in Oregon subjecting more utilities to regulation so that even greater confusion in the matter of control would follow if the various Circuit Courts of the state were held to have original jurisdiction with the Public Service Commission in the regulation of public utilities. The power of the Public Service Commission to regulate was discussed in *Portland Ry., L. & P. Co. v. City of Portland* (D. C.), 210 Fed. 667, in which case the city attempted to regulate the rates of

the utility. United States District Judge BEAN held that under the Public Utilities Act the authority to regulate was conferred in the first instance exclusively upon the Public Service Commission, saying:

“There cannot be two public bodies existing at the same time with original jurisdiction to prescribe and fix the only lawful rates to be charged by a public utility. * * The purpose (of the Public Utilities Act) was to provide a uniform system throughout the entire state for the control and regulation of public utilities and fixing the rates to be charged by them, and to create a tribunal for that purpose.”

In *Pacific Telephone & Telegraph Co. v. Wright-Dickinson Hotel Co.* (D. C.), 214 Fed. 666, District Judge WOLVERTON, in speaking of the Public Utilities Act, said:

“This act has for its purpose the regulation of the public utilities of the state, and the conferring of power and jurisdiction upon the railroad commission of the state (now the Public Service Commission) to supervise and regulate such utilities. * * By Section 6 ‘the Railroad Commission of Oregon (the Public Service Commission) is vested with power and jurisdiction to supervise and regulate every public utility in this state, and to do all things necessary and convenient in the exercise of such power and jurisdiction’—a power and jurisdiction very broad and very comprehensive.”

It is further urged on behalf of the Pacific company that if it be assumed that the Circuit Court has original concurrent jurisdiction with the Public Service Commission in regulating public utilities in Oregon, that there is no authority to compel a telephone company to connect with the private equipment of a subscriber. The particular facts relating to this phase of the case should be borne in mind. The bank has installed what is called a private intercommunicating system. This is composed of wires running through

the bank, upon which are located various telephone stations. At each of these stations the bank has installed its own instruments, and a person may communicate from one of these stations with a person at any other station on the system by taking down an instrument and giving the proper signal. This private system is owned, controlled and maintained by the bank. It is insisted on behalf of the Pacific company that this intercommunicating system was installed with the bank at a time when it knew that the Pacific company furnished its own intercommunicating system to which it willingly connected, but that the Pacific company did not connect with any private system or instrument over which it had no control. The bank installed its private system and a connection was made between this and the lines of the Home company in Albany. Thereafter the bank, without any authority from the Pacific company and without any knowledge on its part, connected a trunk line of the Pacific company which had been installed running to a booth in the bank for temporary service with the private intercommunicating system of the bank. This suit was instituted to legalize such connection or practically to enforce a connection by the Pacific company with the private intercommunicating system of the plaintiff and the system of the Home Telephone Company.

Section 7 of the Public Utilities Act provides as follows:

“Every public utility is required to furnish adequate and safe service, equipment and facilities, and the charges made by any public utility for any heat, light, water or power produced, transmitted, delivered or furnished or * * for any transportation of persons or property by street railroad, or for any service rendered or to be rendered in connection therewith shall be reasonable and just, and every unjust or unreason-

able charge for such service is prohibited and declared to be unlawful.”

By Section 64 of the act it is made unlawful “for any public utility to demand, charge, collect or receive from any person, firm or corporation less compensation for any service rendered or to be rendered by said public utility in consideration of the furnishing by said person, firm or corporation of any part of the facilities incident thereto: Provided, nothing herein shall be construed as prohibiting any public utility from renting any facilities incident to * * the conveyance of telephone messages and paying a reasonable rental therefor, or as requiring any public utility to furnish any part of such appliances which are situated in and upon the premises of any consumer or user, except telephone station equipment upon the subscriber’s premises, and unless otherwise ordered by the commission meters and appliances for measurements of any product or service.”

It is provided in Section 8 of the act that:

“Every public utility, and every person, association or corporation having conduits, subways, street railway tracks, poles or other equipment on, over or under any street or highway shall for a reasonable compensation permit the use of the same by any public utility whenever public convenience or necessity require such use and such use will not result in irreparable injury to the owner or other users of such equipment nor in any substantial detriment to the service to be rendered by such owners or other users.
* * ”

The question of the connection of plaintiff’s intercommunicating system with the Pacific company’s system was passed on by the Public Service Commission December 5, 1913. The commission said:

“From the foregoing the commission finds that the defendant is under no obligation to connect its telephone system with that of any private utility and that the plaintiff, the First National Bank of Albany, does not come within the purview of Section 8, Chapter 279, of the General Laws of Oregon for the year 1911”: *First Nat. Bank of Albany v. Pacific Telephone & Telegraph Co.*, 25 C. L., p. 880.

It will be seen, therefore, that while the question of the connection of the system of defendants with the private telephone system of plaintiff has been considered by the Public Service Commission, the question of the installation of a system in the plaintiff's bank to be used jointly in connection with the Pacific company's and the Home Telephone Company's systems, and to be under the joint control of those companies or the control of some *quasi*-public corporation and to be regulated by the Public Service Commission, does not appear to have been submitted to it.

An injunction is an extraordinary remedy, and in order for the plaintiff to avail itself of this remedy, the circumstances of the case should be such that the harmonious working of the law involved would result. Until the Public Service Commission has fully considered all the questions involved in this case, a court of equity should not, under all the circumstances, interfere and grant injunctive relief.

It was plainly stated by counsel for plaintiff upon the argument that any fair arrangement whereby plaintiff can have the service of both the Pacific Telephone system and the Home Telephone system without two sets of telephone instruments is much desired, and would be satisfactory to plaintiff. Plaintiff asserts that it is willing for the Pacific company to install the intercommunicating system in its bank building, or take, use and control plaintiff's system if that

company will permit the Home Telephone system to be also connected therewith. Such an adjustment would be making a connection of the two systems, and a kind of joint traffic arrangement between the two telephone companies and necessitate the consideration of the interest of plaintiff and the two telephone companies and of the public, and is a proper question for the consideration of the Public Service Commission. Public utilities wherein complex matters, agreements or arrangements are involved should not be attempted to be regulated by injunction. The rule sanctioned in *Pond*, Public Utilities, Section 554, reads thus:

“The courts are agreed that in the absence of a contract between competing or connecting companies for the physical connection of their telephone plants or of a constitutional or statutory requirement that such plants be connected for the purpose of exchanging service, such companies cannot be required to make a physical connection of their plants by the use of a common switchboard or trunk line between their exchanges, although the few decisions on this point suggest that the power resides in the state to make and enforce such a requirement in the form of a regulation of the service.”

See, also, *Wyman*, Pub. Service Corp., § 551.

The Public Utilities Act is designed to promote efficiency in service by public utilities, and in order to obtain such result there must be uniformity in the control and regulation of such utilities. To accomplish this the statute, which is the expression of the will of the people in the exercise of their sovereign power, confers exclusive jurisdiction to supervise and regulate upon the Public Service Commission in the first instance.

The Home Telephone Company is materially interested in any arrangement that may be made for a con-

nection of its system with that of another telephone company, and can be cited to appear before the Public Service Commission in an appropriate proceeding. It is not a party to this suit.

The jurisdiction of the Public Service Commission both under the old law and the Public Utilities Act has been upheld by state and federal courts in the cases above mentioned: *Portland Ry., L. & P. Co. v. Railroad Commission*, 56 Or. 468 (105 Pac. 709, 109 Pac. 273); *Id.*, 229 U. S. 397 (57 L. Ed. 1248, 33 Sup. Ct. Rep. 820). That tribunal has exercised the authority conferred by this law in the matter of *Pacific Tel. & Tel. Co. v. Wright-Dickinson Hotel Co.* (D. C.), 214 Fed. 666, wherein physical connection between the Pacific and Home companies' systems in the Oregon Hotel was found to be feasible, and ordered to be made and adjusted matter of compensation for the joint service required.

At the present stage of the controversy we do not deem that the interposition of a court of equity to grant injunctive relief would be warranted. It follows that the decree of the lower court should be affirmed, and it is so ordered. AFFIRMED.

MR. CHIEF JUSTICE MOORE, MR. JUSTICE McBRIDE
and MR. JUSTICE BENSON concur.

Argued July 11, reversed August 1, 1916.

YOUNG v. PROUTY LUMBER CO.

(159 Pac. 565.)

Negligence—Contributory Negligence—Duty to Observe and Avoid Danger.

1. An invitee at a sawmill was negligent where he saw that a plank was about to be thrown down to a platform on which he was standing, and then looked away without taking further precautions, and was injured thereby.

[As to what contributory negligence is and when it prevents a recovery, see note in 8 Am. St. Rep. 849.]

From Clatsop: JAMES A. EAKIN, Judge.

Department 1. Statement by MR. JUSTICE BENSON.

This is an action by James Young against the Prouty Lumber & Box Company, a corporation, based upon the following facts:

Plaintiff is a teamster, who, at the time of the accident which was the basis of this action, was employed in hauling lumber for the City of Seaside from defendant's sawmill. A plank 3 inches thick, 12 inches wide and 32 feet long, being dropped from the conveyor to a receiving platform about 6 feet below, struck plaintiff, breaking his leg. A trial being had, a verdict and judgment for plaintiff resulted, from which defendant appeals.

REVERSED AND REMANDED.

For appellant there was a brief over the names of *Mr. George C. Fulton* and *Mr. Victor J. Miller*, with an oral argument by *Mr. Fulton*.

For respondent there was a brief over the names of *Messrs. Littlefield & Maguire* and *Messrs. Norblad & Hesse*, with an oral argument by *Mr. Edwin V. Littlefield*.

MR. JUSTICE BENSON delivered the opinion of the court.

1. The important question to be considered is defendant's motion for a directed verdict, which was denied by the trial court. This ruling is assigned as error. In order that the situation may be clearly understood, it should be stated that the sawmill extends east and west; the logs entering at the east side and emerging as a manufactured product at the west end. Outside of the inclosed portion of the mill upon the west a platform, which is a continuation of the mill floor, extends for about 72 feet, bearing two parallel sets of rollers or conveyors, 30 inches high, for the distribution of lumber. Upon the south side of this platform, and attached to it, is a receiving platform $3\frac{1}{2}$ feet lower, to which lumber is dropped from the south conveyor for loading upon wagons. For the purpose of loading his wagon, the plaintiff had driven alongside this receiving platform, and, having placed upon it two or three planks, was waiting for others to be sawed.

We next consider the plaintiff's own testimony as to how the accident occurred. It is as follows:

"Q. To your knowledge—well, what were you waiting for on the platform?

"A. I told you half a dozen times I was waiting for that pile of lumber for me to load.

"Q. You were waiting for the mill to cut?

"A. Cut that, my plank.

"Q. These planks?

"A. Cut that plank that belongs out there on the bridge.

"Q. Well, did you know where it would come when it was cut?

"A. I supposed it came down on the platform; yes.

"Q. You knew, then, as soon as they struck a log, found a log that was of the right kind, of the right

length, this plank would be cut and rolled out on this rollway, didn't you?

"A. Yes, sir.

"Q. And you knew, after it got out on the rollway, it would be thrown down on this platform?

"A. Sure.

"Q. And you were waiting there for that?

"A. Yes, sir.

"Q. That is what you were standing there for?

"A. That is what I was standing there for.

"Q. So you could see it coming quickly?

"A. [No response.]

"Q. I say, you were waiting so you could see it come and get ready?

"A. Yes, sir.

"Q. Well, you saw this plank coming, didn't you?

"A. Yes, sir.

"Q. Sure—and you knew they were going to throw it down on the platform; you knew that is where that timber was going to be thrown, right down on the platform where you were standing?

"A. It would not go any place else.

"Q. No—well, did you see them throw it on to the platform?

"A. I see them catch hold of it; yes.

"Q. To throw it?

"A. Yes.

"Q. Did you look where they were going to throw it?

"A. Look?

"Q. Yes.

"A. I was watching them.

"Q. Did you see it come down toward you?

"A. I don't know; I thought I was plumb out of the way.

"Q. You thought you were clear out of the way?

"A. Yes.

"Q. They were right up above you, not over 7 feet from you?

"A. Gee whiz, I was away out from where they were throwing the lumber.

“Q. I understood you to say you were about 7 feet from where they were.

“A. I was at the end of the platform—where I was standing.

“Q. You were about 7 feet from the plank, and you saw them throw the plank?

“A. [No response.]

“Q. You saw the plank coming?

“A. No; I would not say I saw the plank coming.

“Q. But you saw them throw the plank?

“A. I seen the plank up there.

“Q. I say, you said you saw them throw the plank, didn't you?

“Mr. McGuire: No, sir; he did not.

“A. No, sir; I did not.

“Q. You knew they were going to throw it?

“A. Yes.

“Q. You saw them stop the plank, didn't you?

“A. Yes. sir.

“Q. Sure—and you saw Mr.—I can't think of his name—Kutcher take hold of the plank to throw it?

“A. No; Mr. Kutcher never had hold of that plank.

“Q. Who did?

“A. Grant and that tall fellow there.

“Q. Oh, yes; what's his name, Kutcher, this—that is the man?

“A. The man in the center there [indicating].

“Q. Yes; you saw that man take hold?

“A. And Mr. Grant.

“Q. Yes; Mr. Grant; and you saw Mr. Kutcher?

“A. Yes.

“Q. Take hold of the plank to throw it down, didn't you?

“A. Well, I didn't take no notice.

“Q. You tell the jury that you were standing down on this platform, waiting for this plank to be thrown on the platform—you saw it rolled out on the rollers, saw Mr. Grant take hold of it, to throw it down, and knew it was coming down, yet you didn't look to see where you were when they were throwing it—that can't be true, Mr. Young?

"A. I must have misunderstood you.

"Q. I want to be perfectly fair with you—you knew it was coming down?

"A. Yes.

"Q. You saw it come out?

"A. Yes.

"Q. And you saw Mr. Grant take hold of one end, didn't you, to throw it off?

"A. I saw him pack it over on the rollers next to him.

"Q. Yes; did the plank extend beyond the end of the rollers any?

"A. I would not say about that.

"Q. No; but you knew they were going to throw it down toward you?

"A. I knew they were going to throw it down.

"Q. Still you didn't look?

"A. No.

"Q. You didn't look?

"A. I thought I was out of the way, plumb out of the way.

"Q. You thought surely you were out of the way?

"A. Yes. sir.

"Q. So you didn't take the precaution to take the second look?

"A. No, sir.

"Q. Now, that is the truth?

"A. That is the truth, sir.

"Q. The whole truth, the square truth?

"A. As far as I know; I thought I was safe.

"Q. You thought you were in a safe place?

"A. I thought I was in a safe place.

"Q. So you didn't look at all?

"A. No."

This testimony is the clearest and strongest produced for plaintiff, and is not in any way aided or strengthened by any of defendant's witnesses. From his own testimony it seems to us perfectly clear that he knew all the conditions which existed at the time

of the accident. No notice or warning of any sort could have been given by the men handling the plank which could have enlightened him in any degree as to the impending danger, for he knew all that they knew. It is true that he was an invitee, and therefore the defendant was under obligation to use reasonable or ordinary care to keep the premises in a safe and suitable condition, so that he should not be unnecessarily or unreasonably exposed to danger. At the same time it must not be forgotten that the plaintiff is also under obligation to exercise ordinary care in the protection of his person from obvious dangers. If the servants of defendant were negligent in wrongly judging that plaintiff was in a safe place, it must follow that plaintiff was equally negligent in the same particular. His negligence and theirs were concurrent and simultaneous, and consequently the court committed error in denying the request for a directed verdict.

The judgment is reversed and the cause remanded, with directions to enter a judgment for the defendant.

REVERSED AND REMANDED.

MR. CHIEF JUSTICE MOORE, MR. JUSTICE BURNETT and MR. JUSTICE MCBRIDE concur.

Motion to dismiss allowed August 1, 1916.

D'ARCY v. SANFORD.

(159 Pac. 567.)

Appeal and Error—Necessary Parties—How Determined.

1. Whether one is a necessary party to an appeal depends not on whether he is adverse to the appealing party, but whether he will be injuriously affected by modification or reversal.

Appeal and Error—Necessary Parties—Notice—"Adverse Party."

2. Where the maker of a note secured judgment against the assignee and the maker's former partner, decreeing the note paid and canceled for fraud of such partner in securing it and failing to pay it as agreed, the partner was a necessary and "adverse party," and notice of appeal, to him, was required under section 550, L. O. L., as amended by Laws of 1913, page 617, as to notice of appeal.

From Marion: WILLIAM GALLOWAY, Judge.

In Banc. Statement by MR. JUSTICE HARRIS.

T. R. Sheridan was the president and manager of the First National Bank of Roseburg until S. A. Sanford was appointed trustee to wind up the affairs of the bank. On March 28, 1904, W. J. D'Arcy signed a promissory note for \$3,673.50, payable to the First National Bank of Roseburg. After his appointment as trustee S. A. Sanford commenced an action on June 30, 1911, against D'Arcy to recover on the note, and the latter then filed a complaint in equity in the nature of a cross-bill, and which for convenience will be called a cross-bill, making S. A. Sanford, T. R. Sheridan and R. S. Sheridan defendants.

In 1900 D'Arcy and the two Sheridans formed a partnership to deal in lands. T. R. Sheridan obtained moneys for the partnership from time to time from the First National Bank of Roseburg on the note of plaintiff and R. S. Sheridan. The moneys furnished by the bank were used by T. R. Sheridan in the purchase, in his own name, of lieu land certificates, which had been originally issued by the state land board of Oregon. The national government, however, refused to approve the selections made by the State of Oregon, and consequently the lieu land certificates held by T. R. Sheridan were canceled and all the moneys received by the state when these certificates were originally issued were returned to T. R. Sheridan to whom

the state paid \$4,711.99 in 1904, for the certificates held by him.

W. J. D'Arcy filed the cross-bill for the purpose of preventing Sanford from proceeding with the prosecution of the action at law. The plaintiff in this suit alleges in the cross-bill that when the partnership was formed, it was agreed that T. R. Sheridan would supply the money while W. J. D'Arcy and R. S. Sheridan would perform all the services necessary to conduct the business; that when D'Arcy signed the note T. R. Sheridan promised to sign it and also to procure the signature of R. S. Sheridan; that the money returned by the state to T. R. Sheridan belonged to the partnership and was appropriated by Sheridan to his own use; that at all times until June 30, 1911, D'Arcy believed that the other partners had signed the note, and that T. R. Sheridan had paid the note out of the funds received from the state; that all the business with the bank was conducted through T. R. Sheridan, the president and manager, and that, therefore, the bank had full knowledge of all the dealings among the members of the partnership. The court found that:

“At and prior to the time the said defendant T. R. Sheridan received said last-mentioned sum of money from the State of Oregon it was understood and agreed among the members of the said copartnership that he, the said T. R. Sheridan, should apply the same in payment of the said note for \$3,673.50 mentioned in the pleadings herein.”

And the trial court further found that the bank had full knowledge of all the dealings “among the members of the said copartnership for and on account of the fact that at all the times aforesaid the said defendant T. R. Sheridan was the president and manager of the said First National Bank of Roseburg.”

The decree enjoined the further prosecution of the action at law and adjudged:

“That the note mentioned in the complaint in said action at law was fully paid and satisfied long prior to the commencement of the said action at law.”

Sanford alone appealed. D'Arcy is the only party to the suit upon whom notice of appeal was served, and he now moves to dismiss the appeal.

MOTION ALLOWED.

Mr. John A. Carson and Mr. Peter H. D'Arcy, for the motion.

Mr. John Bayne, contra.

MR. JUSTICE HARRIS delivered the opinion of the court.

It appears from an affidavit filed on behalf of the appellant that notice of appeal was not served “on any party other than the plaintiff, for the reason that defendant R. S. Sheridan had, in effect, never appeared, and the answer of the defendant T. R. Sheridan shows that he was not adverse to the defendant S. A. Sanford.” The appellant claims that R. S. Sheridan did not in fact appear in the suit, and that although the records originally made in the Circuit Court recite his appearance, nevertheless that tribunal had the power at any time to correct the recitals so that they would speak the truth and say that R. S. Sheridan did not appear. It will not be necessary, however, to determine whether the *nisi prius* court could make the correction after an appeal.

1, 2. T. R. Sheridan appeared in the suit by filing a demurrer and then an answer. The decree appealed from prevents the successor of the bank from recover-

ing on the note. The pleadings admit a partnership between D'Arcy and the two Sheridans. If the decree should be reversed by this court, and it should be ruled here that Sanford could recover from D'Arcy and compel him to pay the note, then it is clear that the latter would have a claim against T. R. Sheridan. The test is not whether T. R. Sheridan is adverse to Sanford, but it is whether a reversal or modification of the decree would injuriously affect T. R. Sheridan: *Smith v. Burns*, 71 Or. 133, 134 (135 Pac. 200, 142 Pac. 352, Ann. Cas. 1916A, 666, L. R. A. 1915A, 1130); *The Victorian*, 24 Or. 121, 127 (32 Pac. 1040, 41 Am. St. Rep. 838). A reversal or modification of the decree would injuriously affect the interest of T. R. Sheridan, and service of notice of appeal upon him was essential to confer jurisdiction upon this court, even though he is a codefendant with the appellant: *Lane v. Wentworth*, 69 Or. 242, 245 (133 Pac. 348, 138 Pac. 468). Appellate jurisdiction depends upon service of notice upon all adverse parties, and therefore the appeal must be dismissed because notice was not given to T. R. Sheridan, who is an adverse party within the meaning of Section 550, L. O. L., amended by Chapter 319, Laws of 1913.

The motion to dismiss the appeal is allowed.

APPEAL DISMISSED.

MR. JUSTICE EAKIN took no part in the consideration of this case.

Argued June 22, modified August 1, 1916.

PATTERSON v. CHAMBERS POWER CO.

(159 Pac. 568.)

Vendor and Purchaser—Conveyances — Grant of Easement—Notice—Record.

1. Purchasers of land take title with constructive notice of the grant of an easement theretofore executed and recorded.

Easements—Grant for Future Enjoyment.

2. There is no rule of law prohibiting the grant of an easement to take effect or to be enjoyed in the future.

Waters and Watercourses—Conveyances—Grant of Easement—Validity of Grant of Future Easement.

3. The deed of land, "together with the water-power upon said premises with the right of way over Shaw's land claim to bring all the water that may be required to run the mills thereon, and other mills or machinery that may, at any time or times, be placed upon the above-described premises of whatever kind or nature; also the right to dig the present raceway as wide and deep as may be necessary, and to bank the dirt and stone on either side; also to include sufficient dirt and stone lying adjacent to the dams for the purpose of keeping them in repair"—conveys a sufficiently present and future easement or right sufficiently definite to be valid in view of the circumstances surrounding the grant.

Waters and Watercourses—Conveyances—Grant of Easement—Duty of Grantee.

4. Nothing in such grant calls for action upon part of the grantee until the exigency contemplated in the deed shall arise.

Contracts—Validity—Public Policy.

5. It is contrary to the general policy of the law to restrict the power of citizens to make any kind of contract which they may see fit to enter into, so long as the proposed contract does not affect the morals or well-being of society to such an extent as to be against public policy.

Contracts—Validity—Indefiniteness—Surrounding Circumstances.

6. A contract will not be held void for indefiniteness when, by considering it as a whole and taking into consideration the surrounding circumstances, the true intent of the parties can be ascertained.

Waters and Watercourses—Conveyances—Grant of Easement.

7. If from the terms of a grant of a raceway right of way there is manifested a clear intention that the grantee shall enlarge the space originally occupied by him in accord with the demands of the future, such enlargement will be upheld.

Waters and Watercourses—Conveyances—Grant of Easement.

8. Under an indefinite grant of an easement or right of way for raceway, with nothing to indicate that it may be changed or enlarged in the future, the first location and user fixes the limit of the grant.

Easements—Conveyance—Rights of Servient Owner.

9. The conveyance of an easement over land does not pass the title or interfere with the right of the owner of the soil to occupy it for any purpose not inconsistent with the easement.

[As to servitude of easement to receive the flow of water, see note in 32 Am. Dec. 123.]

Waters and Watercourses—Conveyance—Future Easement—Adverse Possession.

10. Adverse possession of grantor or his successors does not run against the right to enlarge a raceway as required by future necessities, at least until the right to enlarge has accrued, since until that time the grantee cannot object to use of land not needed by him, and is under no duty to warn the fee owners not to use such land because of his future and contingent rights.

Estoppel—Grounds—Disclaimer.

11. In order to work an estoppel, a disclaimer must be so publicly made as to mislead another into believing that the person making it intended to abandon a right, and thereby induce that other to act to his injury in respect thereto.

Estoppel—Acquiescence—Easement.

12. That predecessors of the owner of an easement for raceway, with right of future enlargement, had, in maintaining it, asked permission of adjoining owners to bank upon their property mud and silt that had accumulated in the ditch, and had desisted when objection was made, is not evidence of acquiescence by such predecessors in a claim by adjoining owners adverse to future necessary enlargement of the raceway, where in the conveyance of the original easement there was no right given to maintain the raceway by banking up such deposit on the side.

Waters and Watercourses — Easement — Grants — Construction — "Deepen."

13. The grant of a raceway, with right to dig it as wide and deep as may be necessary to supply future defined needs, does not include or confer the right to maintain the ditch at its then depth by dumping upon adjoining property filth and silt which fortuitously accumulates on its bottom.

Easements—Waters and Watercourses—Nature of "Easement."

14. A pure "easement" is one where the land of one person, which land is denominated the "servient tenement," is subjected to some use or burden for the benefit of the lands of another person, whose lands are termed the "dominant tenement"; but there are many water rights and rights of way for ditches which do not strictly come within this definition and yet are called "easements."

Waters and Watercourses—"Easements"—Raceway.

15. Rights of way for pipe-line or raceway are, in a sense easements, although there is no dominant tenement.

Waters and Watercourses—Conveyance—Easements—Termination.

16. Where an easement for raceway is conveyed as appurtenant to tract, a deed of part of the tract by the grantee passes such proportion of the easement, as the tract sold bears to the entire tract, unless the easement is reserved in the deed, and the easement is not extinguished.

Waters and Watercourses—Conveyance—Easements—Termination.

17. Even if appurtenant to an entire tract, a water right in the nature of an easement may be reserved in a grant of any parcel of such tract, without extinguishing the easement.

Waters and Watercourses—Conveyance—Easements—Termination.

18. The grantees of land subject to a recorded easement for raceway, with right of enlargement for future needs of a certain tract, cannot claim the easement is extinguished because the grantee of the raceway easement has sold part of the tract and reserved the water-power or easement, as long as the water taken is necessarily used on that tract.

Waters and Watercourses—Grant of Easement—Raceway—Manner of Use.

19. The owner of a raceway right of way for power purposes had no right to use the ditch for the purpose of floating logs, timber or cordwood, without protecting its sides from the consequent erosion.

Waters and Watercourses — Grant of Easement — Raceway — Manner of Use.

20. Courts will not interfere with a change of use of a raceway for power purposes to use for floating logs and timber unless it imposes an additional burden upon the servient tenement.

From Lane: JAMES W. HAMILTON, Judge.

Department 1. Statement by MR. JUSTICE McBRIDE.

This is a suit brought by Ida Patterson and 19 other residents of the City of Eugene against the Chambers Power Company and Frank L. Chambers, to enjoin them from widening the mill-race in the City of Eugene and thereby cutting away and destroying the plaintiff's property. The property involved constitutes an attractive residential portion of Eugene, and is of considerable value. It is situated along the banks of the mill-race, which is owned by the defendants and used to conduct water from the Willamette River through the City of Eugene to certain mills situated on 23 acres of land known as the "mill property." The de-

defendants claim and assert the right to widen the mill-race indefinitely as their needs may require, but for their present purposes are proposing to take from plaintiffs only a 20-foot strip of land on either side of the mill-race, which can be done without actually tearing down or destroying any of plaintiff's buildings, but which, nevertheless, will seriously impair the beauty and value of the property. The mill-race was constructed in about 1852. Since that date, and for more than 48 years, the plaintiffs' property, or at least the greater portion of it, has been used for residence purposes. The plaintiffs and their predecessors in interest have improved their said lands to the very edge of the water flowing through the race thereon, making lawns and gardens and planting and growing shade trees, and otherwise improving the land bordering on the ditch, all with the knowledge of defendants and their predecessors in interest, and without any active claim or assertion on the part of the defendants that they had the right to widen said mill-race and cut away the banks thereof. The defendants base their claim to widen the ditch upon certain mesne conveyances from Hilyard Shaw, the original owner of the ditch and of all the land in controversy. The facts may be briefly stated as follows: In 1852 Shaw, being the owner of the land through which the ditch passes, constructed the ditch in controversy for the purpose of supplying water-power to certain mills situated near the northwest corner of the land owned by him. On March 1, 1856, he conveyed to defendants' predecessors in interest 23 acres of land, described generally as beginning at the northwest corner of his donation land claim, thence east along the northern boundary 11 chains, thence south 21 chains, thence west 11 chains to the western boundary, thence north along

said boundary 21 chains to the place of beginning. There was situated upon this tract at the time of the conveyance a sawmill and gristmill owned by Shaw and operated by water-power obtained from the ditch in question here. Shaw's deeds contained clauses which read:

"Together with the water-power upon said premises with the right of way over Shaw's land claim to bring all the water that may be required to run the mills thereon, and all other mills or machinery that may at any time or times be placed upon the above-described premises of whatever kind or nature; also the right to dig the present raceway as wide and deep as may be necessary, and to bank the dirt and stone on either side; also to include sufficient dirt and stone lying adjacent to the dams for the purpose of keeping them in repair."

The greater part of these 23 acres of land and the water right above conveyed are now owned by defendants, who lease water-power conveyed by the ditch to the premises to be used in operating machinery in various factories and mills erected thereon. The defendants from time to time have floated cordwood and other timber along the ditch, and claim the right to do so. The ditch at its present capacity being insufficient to convey the volume of water necessary for the factories now on the 23 acres above described and for other contemplated industries, the defendants proposed and claimed the right to widen the ditch about 20 feet on each side in order to secure the necessary power. Upon the trial there were findings and decree enjoining defendants from widening the ditch, cutting shrubbery or trees along the banks, or floating cordwood or timber upon it, and substantially prohibiting them from in any way extending it laterally, confining

it simply to the right to maintain it at its present capacity. From this decree, defendants appeal.

MODIFIED.

For appellants there was a brief with oral arguments by *Messrs. Thompson & Hardy*.

For respondents there was a brief over the names of *Mr. John M. Pipes*, *Mr. Edwin O. Potter* and *Mr. Lark Bilyeu*, with oral arguments by *Mr. Pipes* and *Mr. Potter*.

MR. JUSTICE McBRIDE delivered the opinion of the court.

1-6. The whole case here turns upon the construction of the deed from Shaw. It is plain and direct in its terms, and was executed and recorded before any of the plaintiffs purchased their property, and they therefore took title with constructive notice of any burden which it created upon their holdings. We are aware of no rule of law, and there is none, prohibiting the grant of an easement to take effect or to be enjoyed in the future, and that is this case. We have first a grant of the water-power upon the premises conveyed which necessarily made the raceway which carried the water across the grantor's premises to the 23-acre tract a present easement in the land conveyed. Then we have the right to dig the raceway as deep and wide as may be necessary to run the mills now on the tract sold, and all other mills or machinery that may, at any time, be placed thereon, which creates a right or easement in the land of the grantor to be taken advantage of and enjoyed whenever the necessity of the case requires. In this there is nothing indefinite, nothing that calls for action upon the part of

the grantee until the exigency contemplated in the deed shall arise. It is contrary to the general policy of the law to restrict the power of citizens to make any kind of contract which they may see fit to enter into so long as the proposed contract does not affect the morals or well-being of society to such an extent as to be against public policy; and it is also a well-recognized principle of legal construction that a contract will not be held void for indefiniteness when by considering it as a whole and taking into consideration the surrounding circumstances the true intent of the parties can be ascertained: Chitty, Contracts (17 ed.), 97, 98.

7-13. Let us now consider the circumstances under which the grant under consideration was made. The conveyance was executed on March 1, 1856, at a time when the now flourishing City of Eugene was a very small country village, which did not arise to the dignity of a corporation until seven years later. The land over which the raceway extended had not been platted, and was all owned by the grantor, who had a sawmill and gristmill upon the 23-acre tract now owned by defendants. Presumably there was water enough, and more than enough, to operate the machinery then employed, and it is evident from all the circumstances, as well as from the terms of the deed, that the parties had in mind at the time the construction of additional factories and mills upon the tract conveyed, and also contemplated the necessity for additional water-power to operate them when they should be so constructed. Hence it was natural that the purchaser should require from the grantor such a conveyance as would effectuate this intention. Plainly it was vital to the grantee in view of the contemplated development of the tract as a factory site that these facilities should be secured, and it was clearly to the advantage of the grantor,

that until the occasion for widening the ditch arose, he should have the use of all the land lying adjacent to it which the present necessities of the grantee did not require. There was no method by which the exact future requirements of the grantee could be estimated or even approximated. As population increased and commerce extended the natural result would probably be to increase the demand for factory and mill sites, which would result in an increased demand for water-power. The demand for manufactured products was then local, for the reason that navigation of the river was only seasonal and difficult, and a transcontinental railroad was a dream and a hope only realized many years after. In this condition of uncertainty as to the developments of the future the parties made the contract in question. The grantee wished to secure all that might be necessary for the possible future development of his power site. The grantor did not wish to grant more than such development might require, and not until it might be so required. Therefore they provided in the deed that the lateral extent of the easement should be measured by the growth of manufacturing industries upon the tract. That this was indefinite as to the extent laterally is in a sense true, but it is no more true than it is in contingent contracts and grants which are made every day and universally recognized by the courts. The principles here enunciated are not new, and have been applied in this state in a case where the grant of an easement was much less specific than in the case at bar. In *Salem Capital Flour Mills Co. v. Stayton Water-Ditch Co.* (C. C.), 33 Fed. 146, 148, decided by Judge DEADY, the grant was:

“The right of a canal-way through all and any lands then owned or occupied by [the grantors] in Marion

County necessary to be passed through in conveying the water of the Santiam into the channel of Mill Creek," and also the right "to enter upon the same for the purpose of cutting a canal sufficiently large to admit the flow of any amount of water required by said company for their purposes at Salem."

A ditch was constructed in 1857, but in 1873 the Santiam River was so deflected from its course as to leave the intake of the ditch quite a distance from the new channel of the river, and the plaintiff prolonged its ditch for a considerable distance up the river to a point where it was practical to establish a new intake. The grantees of the original owner of the land interfered with the operation of this extension of the ditch, contending, as here, that the easement became fixed when the original ditch was dug. Upon this point Judge DEADY observes:

"The power and privilege was not exhausted by the construction of the ditch to a certain point on the river in 1857. For the purpose of maintaining a canal or ditch on, over, and through the Porter donation, so as to receive and take water from the Santiam thereon, in such quantity as the company or its successors in interest might or may need or require at Salem, it continued and still continues in full force. * * At the date of the grant of the easement Porter and wife were seised of an estate of inheritance in the land, and there is nothing in the terms of their deed or the nature or purpose of the easement which at all indicates an intention to grant the easement for a less time than the duration of their own estate in the premises, but the contrary. Hence the right to maintain a ditch on and through the Porter donation was to conduct water from the Santiam to the channel of Mill Creek, for the purposes of the woolen company at Salem, is perpetual; and if, in the course of time or events, it becomes necessary, to accomplish such purposes, to widen, deepen, or lengthen said ditch, the then owner of the easement may do so."

In *Everett Water Co. v. Powers*, 37 Wash. 143 (79 Pac. 617), there was a conveyance to defendants' grantor of a right of way for a water-pipe line over the grantor's land, and the right to divert the flow of water with a habendum to the grantee and his heirs and assigns forever. There was no time limit for the execution of the purposes of the grant. It was contended that the deed was void for uncertainty for that reason, and the court thus disposes of this contention:

"It is claimed that the instrument is void for uncertainty, in that no time certain is fixed for the execution of the purpose of the grant. It was, however, competent for Woods to make such a conveyance without any time limitations. He could convey an interest in the realty as absolutely as he could convey the whole of it. The right of way and the right to divert the water were a part of the realty itself. By the terms of the deed these were conveyed to the grantee, his heirs and assigns forever, subject to certain specified reservations pertaining to the domestic use of the water by the grantor. The absence of specific time limitations must be construed to mean that no such were intended."

It was also claimed that the right of way was abandoned by nonuser. Concerning this the court says:

"Appellants contend that the right of way was abandoned. Soon after the deed was made, and in the same year, the grantee selected a strip for right of way, and began the construction of a pipe-line system. An outstanding lease, older than the right of way and water right, was held by one Crook. The deed was therefore subject to the lease, and the lease continued until 1896. An application by the lessee to enjoin the continuance of construction work, and the diversion of the water, was sustained by this court: *Crook v. Hewitt*, 4 Wash. 749 (31 Pac. 28). Nothing further could be done until after the lease expired in 1896. Meantime there was not an abandonment. The evi-

dence shows that there was no such intention. Some of the constructed work was left in place, and material remained upon the ground. Occasional examination was made of a constructed dam, and debris was removed to prevent injury thereto. But it is insisted, further, that the failure to proceed promptly after the lease expired, together with the delay until 1902, amounted to abandonment. This court held, in *McCue v. Water Co.*, *supra*, that where no time is fixed for the occupation and use of a granted right of way, no mere nonuser, for any length of time short of the period of the statute of limitations, will defeat the right of grantee to occupy and use it for the purposes of the grant. If the statute of limitations comprehends the running of time against a mere nonuser, under a grant of this kind, it in any event did not begin to run until such time as the grantee might have peaceably occupied, which was after the lease expired in 1896. Active user was again attempted about August 1, 1902, and this suit was brought within the same month. A period of six years only having expired, it follows that the limitation period fixed by our statutes for actions pertaining to the possession of lands had not expired."

What is said in the foregoing excerpt in regard to the statute of limitations can manifestly have no application to the case at bar, since no necessity for widening the ditch, and consequently no right to exercise the right to do so, arose until a short time before the commencement of this suit. By the terms of the deed defendants were authorized to widen the ditch so as to furnish water to propel such machinery as might be placed upon the tract conveyed in the future; and to widen it at once and before there was any probability that an increased flow of water would be required would have been going beyond the terms of the grant. While the defendants would probably not be required to enlarge their ditch piecemeal, there

certainly must be some present probability that, either at the time of the enlargement or within a reasonable time in the future, the increase of manufacturing establishments on the tract conveyed would fairly justify such enlargement.

The case of *Collins v. Driscoll*, 34 Conn. 43, is an instructive case. In that case land was conveyed which had on it a drainage ditch leading from it over the grantor's land; the ditch then being six feet deep, six feet wide at the top, and two feet wide at the bottom, the sides sloping so as to prevent the banks from caving in. The conveyance was of the land "with the privilege of deepening the ditch leading from the premises, to drain the same over the grantor's land as deep as the grantees may desire." To deepen it required either curbing or widening it at the top, which latter was the usual mode of ditching swamp-lands. The grantees later desired to deepen the ditch, and in order to do this without curbing, they widened it at the top, cutting away such portions of plaintiff's adjoining soil as were necessary for that purpose, and thereupon plaintiff brought an action of trespass. Plaintiff's counsel argued among other matters:

"The words giving 'the privilege of deepening the ditch' to an unlimited depth cannot be strained to confer the right to widen to a proportionate or unlimited width. The construction of words should be according to the literal sense: 1 Swift, Dig., 223, 229. It is only where the language is equivocal or doubtful that the situation of the parties or the surrounding circumstances may be shown: *Strong v. Benedict*, 5 Conn. 210; *Brown v. Slater*, 16 Conn. 195 (41 Am. Dec. 136). The circumstances confirm the literal construction. Simply deepening the ditch would not injure the plaintiff's meadow; widening would. Again, no man would convey an unlimited right to deepen and widen also, for this would be more than equivalent

to conveying all his land. The language conferring the privilege of deepening the ditch is equivalent to an express provision that it shall not be otherwise disturbed."

But the court held that when the grantor gave the privilege of deepening the ditch, the parties must have had in mind the method that the grantor had used in its original construction, i. e., by sloping the sides so as to prevent caving, instead of the unusual method of curbing, and that, therefore, the grantees took by implication the right to enter upon and cut away plaintiff's land for that purpose. This case is in many particulars similar to the case at bar, except in so far as the court goes beyond the necessities of the case at bar in holding the right to cut away plaintiff's land was conferred by implication, while here such right is expressly conferred. There, as here, the extent of such lateral easement was not directly expressed; there, as in the case at bar, the actual extent of the right was limited only by the future necessities of the grantee, and there, as here, there was no limitation as to the time within which the right should be exercised. Other cases more or less remotely bearing upon this phase of the case are: *Adams v. Warner*, 23 Vt. 395; *Stevenson v. Wiggin*, 56 N. H. 308; *Jordan v. Mayo*, 41 Me. 552; *Herman v. Roberts*, 119 N. Y. 37 (23 N. E. 442, 16 Am. St. Rep. 800, 7 L. R. A. 226); *Quigley v. Baker*, 169 Mass. 303 (47 N. E. 1007); and see generally notes to *Winslow v. Vallejo*, 5 L. R. A. (N. S.) 851; *Spear v. Cook*, 8 Or. 380; *Wheeler v. Wilder*, 61 N. H. 2; *Standard Oil Co. v. Buchi*, 72 N. J. Eq. 492 (66 Atl. 427). The effect of all these cases is that if from the terms of the grant there is manifested a clear intention that the grantee shall enlarge the space origi-

nally occupied by him in accordance with the demands of the future, such enlargement will be upheld.

The able and ingenious counsel for plaintiffs have suggested no good reason why upon principle such an easement may not be created, and the authorities cited by them fail to support their contention. In the first case cited (*Barrett v. Hosmer*, 1 Root (Conn.), 271) there was a grant to the defendant of the privilege of erecting a gristmill and dam. The grantee built the mill and dam about the year 1687, and the dam was maintained at a certain height until about 1790, when the then owners raised it 10 inches, thereby overflowing plaintiff's meadow. It was held that the easement became fixed and definite when the dam was built and long maintained at the original height. It will be noticed here that there was nothing in the grant providing for a future enlargement of the easement, as there was in the deed through which defendants claim, and it has always been the law that where there is an indefinite grant of an easement of this character, with nothing to indicate that it may be changed or enlarged in the future, the first location and user fixes the limits of the grant. The next case (*Chapman v. Newmarket*, 74 N. H. 424 (68 Atl. 868, 15 L. R. A. (N. S.) 292), was a case where there was a grant of a right of way to flow water across the grantor's lands, the quantity of water not being specified. It was held that such a grant conveyed an unlimited reasonable right to flow water, but that the grantee could not flow water where there was no necessity for it. The gist of the holding in that case was that the defendant could not flow water for which he had no use when such flow injured an adjoining proprietor. The right to flow water in a reasonable manner to the extent of the grantee's necessities was conceded. The next case cited, and

the only one which comes anywhere near supporting plaintiff's contention, is *Wood v. Saunders*, L. R. 10 Ch. 582. The case is poorly reported and the opinion ambiguous. Saunders and Bruce leased a mansion and the grounds about it to Wood for the term of two years, with the option to purchase at the end of that period. The lessee was to have the privilege of the free passage of water and soil to the existing cesspools on other lands of the grantor in and through all sewers then constructed, or to be constructed, through such lands for the term of two years. The mansion on the premises, called the "Priory House," could not be enlarged during the period of the lease without the consent of the lessor, and in its then condition it could accommodate about 25 persons. Before the expiration of his lease Wood exercised his option, and purchased the premises, taking a deed which gave him "the free running of water and soil in and to the existing cesspools and in and through all the drains, sewers and watercourses, constructed or thereafter to be constructed, through the adjoining property of L. B. Knight Bruce."

The only cesspool then existing on the adjoining property of Bruce was an open ditch or moat about 150 yards from the Priory House, and the only drains or sewers were those conveying the water and sewage from the Priory House to the moat, and only a part of this drainage was carried there. When Wood got his title, he enlarged the Priory House from a building suitable for 25 inmates to one that would accommodate 150 persons, and converted it into a lunatic asylum, in consequence of which the volume of sewage was greatly increased, creating an intolerable nuisance. Saunders being in possession of the Bruce lands stopped up the drains, and Wood brought suit to en-

join him. It was held that the deed should be construed as giving no greater easement than that existing under the lease, and that the right of drainage should be referred to the conditions existing at that date when the Priory House accommodated only 25 persons. The conclusion of the vice-chancellor seems to have been that the grantee was free to construct as many new drains as he wished, but that the aggregate flowage through them could not be increased beyond what it was at the time the deed was made.

In the case at bar the deed expressly permits a future increase in the flow of water, and expressly provides that the ditch may be widened to accommodate it. There is no room here for speculation as to what Hilyard Shaw intended to grant by his deeds. If it is in the power of a man by deed to grant an easement which may be enlarged according to the future requirements of the grantee, and to make such future requirements the measure of the extent of his right, then the grantor has used apt words to accomplish that very thing. It is a question of his power to so contract, not of construction as to the meaning of the conveyance. We have given more than usual consideration to the last case cited, for the reason that at first glance it apparently sustains the contention of plaintiffs, although a critical analysis of it shows that the conditions in that case were so different from the one at bar that it can have no application.

Other cases are cited by counsel, but, when examined, they all turn either upon a construction of the terms of the grant, or upon that well-known principle that where an indefinite easement is granted, such as a right of way across the grantor's land, without specifying the particular location, or the right to flow water through a ditch without specifying the quantity,

the act of the grantee in using a particular portion of the land as a way in the first instance, or the act of the grantee in the second instance in habitually and for a long period flowing a certain quantity of water, is a practical construction of the intent and extent of the grant; but in none of the grants involved in the cases cited does there appear a provision for a future enlargement of the right of the grantee such as appears in the case at bar.

The possession by the plaintiffs of the parcels of land adjoining the ditch has not been adverse to defendants. The conveyance of an easement over land does not pass the title or interfere with the right of the owner of the soil to occupy it for any purpose not inconsistent with the easement: Washburn, Easements (3 ed.), 3, 9; Goddard, Easements, 4. It follows, therefore, that the plaintiffs, who are successors of Shaw, had a perfect right to occupy and improve their land adjoining the ditch, so long as such occupation or improvement did not interfere with the operations of defendants. Defendants were never in a position to bring ejectment or trespass against them until they were in a position to show that the use of the adjoining land was necessary, and that the growth of manufacturing business upon the 23-acre tract had made it essential for them to widen the ditch in order to procure additional power. If the plaintiffs, with the conveyance of Shaw to defendants' predecessors staring them in the face, saw fit to make valuable improvements upon the adjoining lands under the mistaken idea that the necessity for defendants' occupying it would never arise, or that the rights given by Shaw's conveyances would not or could not be successfully asserted, they will have to take the consequences of that mistake. They had a legal right to take that risk,

and an absolute legal right to improve the banks of the ditch subject to the encumbrance created by Shaw's conveyance to defendants' predecessors.

The case of *Arthur Irr. Co. v. Strayer*, 50 Colo. 371 (115 Pac. 724), is cited and quoted from at length as holding a view contrary to that above expressed, but a close examination of it shows that the plaintiff in error in that case had simply an oral permission to construct a ditch across certain lands, without any stipulation as to its width; that in 1873 they constructed a ditch 10 feet wide on the bottom, and maintained it at that width until 1906, when they proposed to widen it to the extent of 40 feet, 20 feet on each side. Strayer and other grantees of the original owners of the land adjoining, which subsequent to the construction of the ditch had been laid out in lots and blocks, brought a suit to enjoin the proposed widening of the ditch. It was held that:

“Where one buys lands, through which, at the time, there exists an irrigating ditch in operation, the right of the owner of such ditch to maintain and use the same as before is in no wise affected. The right so acquired is an easement in the lands through which the ditch runs, but the legal title of the lands upon which the servitude rests is in the owner of the servient estate. While the right so acquired extends to the bed of the ditch and sufficient ground on either side thereof to properly operate the same, it does not vest authority in the owner of the ditch to place a greater servitude or burden upon the lands than existed at the time the ditch was constructed, or was reasonably necessary to properly operate it. The extent of the right necessarily depends, in each case, upon various circumstances and conditions.”

The court says further:

“The defendant held no right of way by deed. Its right was an easement depending solely upon con-

tinued use. It not only failed to use the particular land in question, but acquiesced in its use and improvement by the very ones in whom the fee was vested."

The case is not different from a hundred others that might be cited, holding that where the right of way is granted in general terms, it becomes fixed by location and user. In the case cited there was no grant and no provision for future widening of the ditch; here there are both. Neither is there anything shown here that ought to work an estoppel. The defendants were under no legal obligation to warn the owners of the fee not to do that which they had a perfect legal right to do. Had defendants been the owners in fee of the lands adjoining the ditch with the present right of possession, and under such circumstances permitted the plaintiffs to make improvements upon the property under a mistaken idea as to their title, perhaps it would have been their legal, and certainly their moral, duty to have spoken, but they were not the owners of the fee, and had no present right of possession, except, perhaps, to pass along the ditch for the purpose of improving or protecting it, and it was no more their duty to warn the owners of the fee against making improvements upon their potential right of way than it is the duty of a purchaser of a mortgage to warn the mortgagor against making improvements upon the encumbered property that may be sold to satisfy the exigency of the mortgage. The grant made by Shaw created an encumbrance on the property adjoining the original ditch, and the recording of the deed was notice of that encumbrance, and parties making improvements along the route of the ditch and near enough to be affected by any probable widening of it that the grantees might

make, made them at their peril. There is no evidence of acquiescence in the improvements by defendants further than that they did not actually object to them, and that they did not declare orally the claim which their deeds were asserting all the time.

It is claimed that Walter Edris, a former owner of an interest in the ditch, disclaimed the right to widen the ditch, and that this disclaimer is binding upon the defendants. His testimony, however, does not indicate any disclaimer, but a mere failure to assert a right which his statements show it was unnecessary to assert, as he testifies that the ditch then furnished all the water that was necessary. A disclaimer, to be of value, must have been so publicly made as to have misled another person into the belief that the person making it intended to abandon an existing right, and thereby induced him to act to his own injury in respect to the subject matter. Such a state of facts does not appear in the testimony here. Neither is the fact that Edris and other grantees asked permission of adjoining owners to bank upon their property the mud and silt that had accumulated in the bottom of the ditch, and had desisted when objection was made, any evidence of acquiescence by them in an adverse claim by adjoining owners as against the easement now claimed by defendants. To "deepen and widen the ditch" means to make it deeper and wider than it then was, and does not, either by its terms or by reasonable implication, mean that in order to maintain it at its then depth defendants were at liberty to dump upon adjoining property filth and silt which had fortuitously accumulated on the bottom, thereby rendering it shallower. They had no such right.

14-18. It is claimed that the easement granted is appurtenant to the 23 acres of land conveyed, and that

a conveyance of a portion of the land reserving the water-power extinguishes the easement so far as these defendants are concerned; the argument being that these defendants are not themselves engaged in operating machinery on the tract, but are selling power to other persons who are operating such machinery and who are not demanding any increased power. The authorities cited do not sustain this position. A pure easement is one where the land of one person, which land is denominated the "servient tenement," is subjected to some use or burden for the benefit of the lands of another person, whose lands are termed the "dominant tenement"; but there are many water rights and rights of way for ditches which do not strictly come within this definition and yet are called easements. For instance, one may purchase the right of way for a pipe-line to convey water for the purpose of selling it to such of the inhabitants of a particular town as may choose to buy, and yet, strictly speaking, there is no dominant tenement and the way is appurtenant to nothing. The same is true of a ditch constructed for the conveyance and sale of water to persons along the line who may desire to purchase, or for general sale to persons who desire it for power purposes. Rights of way for these purposes are in a sense easements, but there is no dominant tenement.

The deed in question conveys: (1) A specific parcel of land; (2) a right to the grantee to the ditch and water flowing therein for the purpose of operating the machinery then upon the land and such other machinery as should be placed there; (3) the right to enter upon the grantor's land and appropriate so much of it as may be necessary to operate any machinery placed upon the granted premises in the future. In the very nature of things the water right

was the principal thing conveyed. The 23-acre tract described in the deed would be worthless if there were not water to operate the machinery, and the future development of the tract as a factory district would be impossible without the right to convey across the land of the grantor such additional water as would make such factories practicable. Conceding for the purposes of the argument that the terms of the deed made the water appurtenant to the tract conveyed, it does not follow that a segregation of the tract by sale of part of it destroyed the water right. Unless reserved in the conveyance, it would pass by the deed in such a proportion as the acreage of the tract sold bore to the whole 23 acres: *Ruhnke v. Aubert*, 58 Or. 6 (113 Pac. 38).

But even if an appurtenance to the 23 acres, the water right may be reserved in a grant to any parcel of the land: *Sweetland v. Olsen*, 11 Mont. 27 (27 Pac. 339). Defendants' relation to the water right and way in question is fixed by the deed, which, in effect, grants to them all the power then produced through the agency of the ditch, and as much more in the future as can be used in factories erected on the 23-acre tract. They would have no right to cover the tract with factories to its full capacity, and then build other factories upon adjoining land and increase the capacity of the ditch in order to supply these additional mills, because this would be putting a burden upon the servient estate beyond that which was contemplated in the grant; but so long as they confine their operations to factories situated upon the 23 acres, it is a matter of no moment to these plaintiffs, who take subject to Shaw's conveyance to defendants' grantors, how the water is apportioned among occupants of the dominant tract. Neither is it of im-

portance as to who owns the tract. The defendants own power as well as land, and it is inconceivable that it was the intention of the grantees of Shaw to cover the 23 acres with their own mills. The tract was principally valuable as a place where factories could be built and the water-power thereby find a market. The transmission or leasing of water-power to factories and mills is a common thing in the manufacturing portions of this country, and the prospective chance of doing so with profit in this instance was probably one of the incentives for the original purchase of this tract and water right from Shaw.

There are, no doubt, cases where the right or easement is so intimately connected with the land that a reservation of it destroys it entirely. Such a case is *Cadwalader v. Bailey*, 17 R. I. 495 (23 Atl. 20, 14 L. R. A. 300). Cadwalader purchased from Bailey and another certain lands situated adjacent to Bailey Beach, a bathing resort. In the deed was a covenant by the grantors that they would not construct any buildings upon certain parts of said beach between the lands granted to plaintiff and the water; the evident object of this covenant, as the court found, being to preserve the view of the grantee from obstruction. Cadwalader sold the granted premises to another, but in the deed reserved to himself all the rights arising from the covenant of his grantors not to build in front of the land. His grantors did build, and he brought a bill in equity to compel them to remove the building. The court held that as the purpose of the covenant was to prevent an obstruction of Cadwalader's view from the premises sold to him, and as he had sold the premises, and therefore had no view to obstruct, he had no cause of suit, and his reservation destroyed the easement created by the covenant. But here defendants

have a profit in the lands they have conveyed or leased by furnishing water-power for the factories thereon. As they or their predecessors could have bought the water right without buying the land in the first instance, so they can sell the land without selling the water-power now, or they can sell the water right and retain the land; the only restriction being that whatever water-power is used must be used in factories erected on this tract, and that no more may be taken than is necessary for these purposes.

19, 20. The defendants have no right to use the ditch for the purpose of floating logs, timber or cordwood, without protecting its sides from the erosion that is necessarily caused by such use of it. Courts will not interfere with a change of use of an easement of this character unless it imposes an additional burden in some way upon the servient tenement, but it is clear that unless the banks of the ditch are protected, either by booming, riprapping with stone or bulkheading with timber, such use will add to the burden, and it should be prohibited until this is done.

The defendants will be permitted to widen their ditch so as to bring it up to 50 feet in width, and will be enjoined from further widening it, and from throwing mud and silt from the bottom upon adjacent property. Neither party will recover costs here or in the court below.

MODIFIED.

MR. CHIEF JUSTICE MOORE, MR. JUSTICE BURNETT and MR. JUSTICE BENSON concur.

Argued June 28, modified August 1, 1916.

EUGENE v. CHAMBERS POWER CO.

(159 Pac. 576.)

From Lane: JAMES W. HAMILTON, Judge.

Department 1. Statement by MR. JUSTICE McBRIDE.

This is a suit by the City of Eugene against the Chambers Power Company, a corporation, and Frank L. Chambers. From a decree in favor of plaintiff, defendants appeal. MODIFIED.

For appellant there was a brief with oral arguments by *Messrs. Thompson & Hardy*.

For respondent there was a brief over the name of *Messrs. Skipworth & Lewis*, with an oral argument by *Mr. Jay L. Lewis*.

MR. JUSTICE McBRIDE delivered the opinion of the court.

This is a suit brought by the City of Eugene to prevent the defendants from widening their ditch passing through the city where it crosses certain streets therein, and to enjoin them from floating logs, timber and cordwood along said ditch to the injury of the banks where it crosses the streets. Every question involved in this case is fully considered in the case of *Patterson v. Chambers Power Co. et al.*, ante, p. 328 (159 Pac. 568), and this case will take the same course, and a decree will be entered herein to the same effect as in that case. Neither party will recover costs in either case. MODIFIED.

MR. CHIEF JUSTICE MOORE, MR. JUSTICE BURNETT and MR. JUSTICE BENSON concur.

Argued July 18, affirmed August 1, 1916.

FLAVEL LAND CO. v. LEINENWEBER.*

(158 Pac. 945.)

Municipal Corporations—Alteration—Detachment of Territory.

1. Under Article IV, Section 1a, and Article XI, Section 2, of the Constitution, authorizing voters of a municipality to amend its charter, the electors may change the corporate boundaries by excluding territory previously included within its limits.

From Clatsop: JAMES A. EAKIN, Judge.

Department 2. Statement by MR. JUSTICE BURNETT.

This is a suit by the Flavel Land & Development Company, a corporation, against F. P. Leinenweber and the City of Warrenton, Oregon.

Among others in Clatsop County, there are two incorporated towns, one the City of Warrenton, and the other the town of Clatsop. The defendant Leinenweber is the assessor of that county. The plaintiff avers that the officer is threatening and intending to list its real property for taxation in Warrenton, whereas its land is not within the boundaries of that municipality. The answer traces the history of the town of Clatsop, contending that its charter was unconstitutional in certain particulars, and that for a long time its government was inert, but that finally so far as they lawfully could the legal voters therein passed an ordinance providing for the manner of exercising the initiative and referendum powers reserved to municipal corporations and the legal voters by Section 1a of Article IV and Section 2 of Article XI of the Constitution; that afterward in pursuance thereof the legal voters amended the charter so as to exclude

*The cases passing on the question of power of the legislature to annex or change territory of municipality, are gathered in a note in 27 L. R. A. 737. REPORTER.

part of the territory originally within the municipal boundaries of Clatsop and that plaintiff's land was in the part thus cut off. Subsequently, so the answer states, the City of Warrenton provided for an election to be held, not only within its corporate limits, but also in the outside territory sought to be included, and that the result was to enlarge the boundaries of Warrenton so as to take in the plaintiff's property. On a hearing all other questions were waived; it was agreed that the proceedings were formally correct, and the cause was submitted upon the one question, to wit:

"Has a municipality of the State of Oregon power to so change its boundary lines within its charter as to exclude territory theretofore included in its boundaries?"

Or, to quote the plaintiff's brief:

"In other words, if the town of Clatsop had the authority by these ordinances and proceedings which are set forth in the answer and stipulation, and which are for the purposes of this case admitted to be regular, then the lands owned by the plaintiff are within the boundary lines of the City of Warrenton. If a municipality has not the power to change its boundary lines by eliminating territory, then these lands in controversy are within the town of Clatsop and it of course follows that they are not within the City of Warrenton."

The Circuit Court entered a decree dismissing the suit, and the plaintiff appealed. **AFFIRMED.**

For appellant there was a brief over the name of *Messrs. Huston & Huston*, with an oral argument by *Mr. Samuel B. Huston*.

For respondents there was a brief over the names of *Mr. George C. Fulton, Mr. J. J. Barrett, Mr. Albert M.*

Smith and Mr. John Cahalin, with oral arguments by Mr. Fulton and Mr. Barrett.

MR. JUSTICE BURNETT delivered the opinion of the court.

1. A change in the boundaries of a city constitutes an amendment to its charter: *Cooke v. Portland*, 69 Or. 572 (139 Pac. 1095). As stated by Mr. Chief Justice McBRIDE in *State ex rel. v. Portland*, 65 Or. 273, 285 (133 Pac. 62):

“The true test is this: Could the legislature before it was deprived of the power to enact or amend charters have enacted this revision?”

Tested by this canon, a change in the boundaries, whether for greater or less, is a legitimate amendment of a charter, the power to effect which is committed to the legal voters of the municipality by the constitutional provisions above mentioned.

An amendment implies an addition or change within the scope of the original instrument so as to effect an improvement or better carry out the purpose for which it was framed, while a repeal signifies an utter abrogation of the previous legislation. *McKeon v. Portland*, 61 Or. 385 (122 Pac. 291), was an effort on the part of the municipal government of the defendant, without consulting its own electors, to extend its authority over the entire territory of the adjoining City of St. Johns upon the assent of the majority of those voting upon the question in the latter municipality, but without any action or sanction of its governing authorities. It amounted to an absolute repeal of the charter of St. Johns, a prerogative not permitted even to the legal voters of any city, and much less of any neighboring borough. *Cooke v. Portland*, 69 Or. 572 (139 Pac. 1095), was a case where extraurban electors

essayed to vote themselves into the city and their effort was deemed vain because no notice of the election was given, no opportunity was afforded to the voters in the city to express their will on the subject, and, lastly, the procedure contemplated an amendment of the charter of Portland by those living outside its limits. *Couch v. Marvin*, 67 Or. 341 (136 Pac. 6), was where the electors of a city voted to extend the limits of their municipality by adding a few acres on the east and also by annexing a narrow strip 320 feet wide extending from the north boundary of the corporate limits a distance of about three fourths of a mile, and then spreading out the line to embrace all the town site of Evans, with the exception of three blocks, thereby annexing the lots and blocks described in the complaint and the depot grounds of a railroad company, in which new territory there were but two legal voters not sufficient in number to hold an election. In an opinion by Mr. Justice BEAN this proceeding was condemned on the ground that the city was endeavoring to exercise dominion over territory beyond its limits without the consent of the outside electors expressed in an election held there for the purpose. The same doctrine had been previously announced by Mr. Justice McBRIDE in *Thurber v. McMinnville*, 63 Or. 410 (128 Pac. 43).

The present case is not like any of those. The record discloses that the legal voters of the town of Clatsop amended its charter so as to contract its municipal boundaries. This was legitimate because the same thing could have been done by the legislative assembly under the former *régime* before the Constitution was amended, thus meeting the test of *State ex rel. v. Portland*, 65 Or. 273, 285 (133 Pac. 62). Clatsop did not amend itself to death so as to be guilty of suicide

within the meaning of the McKeon Case. As much as ever before, there remains an actual municipal entity known as the town of Clatsop. It appears, nay, indeed it is conceded, that the proceedings taking into the City of Warrenton the country including plaintiff's holdings were regular. Both in the reduction of the area of Clatsop and in the increase of Warrenton's territory the legal voters on both sides of the question had opportunity to declare their will on the subject thus conforming to the spirit of the new features of the Constitution.

Reduced to its lowest terms upon the issue presented for our consideration, an affirmative answer must be given to the question stated by the appellant in his brief. We hold, therefore, that a change in the boundaries of a municipality excluding territory, theretofore subject to its authority, is a legitimate amendment of its charter which may be accomplished by the vote of its legal electors.

The decree is affirmed.

AFFIRMED.

MR. CHIEF JUSTICE MOORE, MR. JUSTICE BEAN and MR. JUSTICE HARRIS concur.

MR. JUSTICE EAKIN absent.

Submitted on briefs July 13, affirmed August 1, 1916.

SABIN v. KYNISTON.*

(159 Pac. 69.)

Fraudulent Conveyances—Evidence—Sufficiency—Fraud—Circumstantial Evidence.

1. In action to set aside a conveyance as fraudulent, it is not essentially requisite that there be direct proof of fraud, but the necessary deceit may be proven by circumstantial evidence.

Fraudulent Conveyances—Evidence—Burden of Proof—Fraud.

2. In such action, one alleging fraud or any other material matter must prove it.

Fraudulent Conveyances—Transaction Invalid—Knowledge of Grantee.

3. The title of a purchaser is protected from attack as based on fraudulent conveyance where, without knowledge or notice of vendor's intent or of fraud, he has paid a valuable consideration, under Sections 7397, 7400, 7401, L. O. L., providing that every conveyance of any estate or interest in land made with the intent to hinder, delay, or defraud creditors or other persons of their lawful suits or demands as against the person so hindered, delayed or defrauded shall be void; that the question of fraudulent intent shall be deemed one of fact, not of law; and that the statute shall not affect the title of purchaser for valuable consideration unless it appears he had previous notice of the fraudulent intent of his immediate grantor of the fraud, rendering such grantor's title void.

Fraudulent Conveyances—Burden of Proof—Knowledge by Purchaser of Fraudulent Intent of Grantor.

4. Under Section 7401, L. O. L., providing that the statute as to fraudulent conveyances shall not impair title of purchaser for valuable consideration unless it shall appear that he had previous notice of the fraudulent intent of his immediate grantor, one of the essentials which the plaintiff, in suit to set aside a conveyance as fraudulent, must establish is that the purchaser had previous notice of the fraudulent intent of his grantor.

Judgment—Lien—Docketing Judgment of Federal Court—Constructive Notice.

5. Where judgment of the United States court was not docketed in the county where land was situated until long after conveyance from judgment debtor to purchaser, there was no imputed notice to the purchaser of the determination of the cause in the United States court, under Sections 210-212, L. O. L., providing that United States court judgments shall be a lien from the time of docketing a transcript in any county, etc.

*As to effect of participation by purchaser in fraud of vendor which will invalidate transfer for good consideration as against the vendor's creditors, see comprehensive note in 32 L. R. A. 33. REPORTER.

Fraudulent Conveyances—Evidence—Sufficiency—Notice to Grantee.

6. In suit to set aside a conveyance as fraudulent, evidence that there was a rumor current among farmers, in the neighborhood where land was situated, that grantor had been sued, the grantee living several miles distant, and no knowledge of this rumor being imputed to him, was not sufficient to show grantee's knowledge of fraud.

Fraudulent Conveyances—Bona Fide Purchaser—Actual Notice.

7. Actual notice of fraudulent intent by vendor must be shown to avoid a sale to a purchaser paying a valuable consideration.

[As to knowledge of vendee as affecting validity of conveyance alleged to have been fraudulent, see note in 34 Am. St. Rep. 895.]

Fraudulent Conveyances—Evidence—Knowledge of Grantee—Circumstantial Evidence.

8. Actual notice to grantee of fraudulent intent by vendor may be proven by circumstantial evidence.

Evidence—Conclusiveness on Party Introducing Witness.

9. Where a party calls a witness, he thereby represents him to be worthy of credit, or at least not so infamous as to be wholly unworthy of it.

Fraudulent Conveyances—Evidence—Sufficiency—Payment of Valuable Consideration.

10. In action to avoid a conveyance as fraudulent, testimony of grantee, called as plaintiff's witness, of payment of valuable consideration, and testimony of his son as to remittances to such grantee for use in buying the land, held sufficient to show payment by grantee of valuable consideration.

From Wasco: WILLIAM L. BRADSHAW, Judge.

In Banc. Statement by MR. JUSTICE BURNETT.

This is a suit by R. L. Sabin, trustee in bankruptcy of the estate of A. L. Kyniston, against T. E. Kyniston and H. A. Patton.

In substance, the complaint in this suit is that on May 12, 1914, in the United States District Court for the District of Oregon, the plaintiff recovered a judgment against the defendant Kyniston for \$1,760, with interest and costs upon which on the 22d of that month an execution was issued and returned unsatisfied before the commencement of this suit; that on May 18, 1914, Kyniston, for the purpose of defrauding the plaintiff and preventing him from collecting the judg-

ment, conveyed to Patton a tract of land in Wasco County not then nor ever exempt from execution; that the latter knew of the judgment and received the conveyance with the same intent and purpose imputed to his grantor; that there was no consideration for the transfer, the \$1 mentioned in the deed referred to being merely nominal; and, finally, that after making the conveyance Kyniston had no property which the plaintiff could find or out of which he could satisfy his adjudicated claim. Except the allegation of the actual transfer of the land, all the averments of the complaint are traversed by the answers, which pleadings state in substance that Patton bought the realty in question in good faith paying one thousand dollars therefor, assuming a mortgage of one thousand dollars then on the property with accrued interest, and promising to pay the balance of taxes then due, all without any knowledge or notice or reason to believe that Kyniston owed anything to the plaintiff or desired to dispose of his property to defraud any creditor.

The separate answers of both defendants were substantially the same. The replies controverted the pleadings of the defendants in material particulars. From a decree dismissing the suit, the plaintiff appealed.

Submitted on briefs under the proviso of Supreme Court Rule 18: 56 Or. 622 (117 Pac. xi).

AFFIRMED.

For appellant there was a brief submitted by *Mr. Sidney Teiser*.

For respondents there was a brief presented by *Mr. Frank G. Dick*.

MR. JUSTICE BURNETT delivered the opinion of the court.

1-3. It is well settled that it is not essentially requisite that there be direct proof of fraud. Indeed, this is generally impracticable, and the deceit necessary to impeach a conveyance may be proven by circumstantial evidence: *Elfelt v. Hinch*, 5 Or. 255; *Williamson v. North Pac. Lbr. Co.*, 42 Or. 153 (70 Pac. 387, 532); *Kabat v. Moore*, 48 Or. 191 (85 Pac. 506); *Phipps v. Willis*, 53 Or. 190 (96 Pac. 866, 99 Pac. 935, 18 Ann. Cas. 119). On the other hand, it is a legal platitude to say that he who alleges fraud or any other material matter which is denied must prove the same according to his averment. It has been established by precedents in this state that three things concurring will protect the title of the purchaser: (1) He must buy without knowledge of the bad intent on the part of the vendor; (2) he must be a purchaser for a valuable consideration; and (3) he must have paid the purchase money before he had notice of the fraud. It is provided by Section 7397, L. O. L., that every conveyance of any estate or interest in lands made with the intent to hinder, delay or defraud creditors or other persons of their lawful suits or demands as against the person so hindered, delayed or defrauded shall be void. The effect of this is limited by two sections reading thus:

Section 7400: "The question of fraudulent intent in all cases arising under the provisions of this chapter shall be deemed a question of fact, and not of law."

Section 7401: "The provisions of this chapter shall not be construed in any manner to affect or impair the title of a purchaser for a valuable consideration, unless it shall appear that such purchaser had previous notice of the fraudulent intent of his immediate grantor, or of the fraud rendering void the title of such grantor."

4-8. Under the latter, one of the essentials which the plaintiff must establish is that the purchaser had previous notice of the fraudulent intent of his grantor. On this point, it is conceded that the judgment of the United States court was not docketed in Wasco County, where the land was situated, until long after the conveyance from Kyniston to Patton. Sections 210, 211 and 212, L. O. L., cover this subject permitting such docketing, and prescribing that from the date thereof the judgment shall be a lien upon the real property of the defendant within the county where the same is docketed. For want of compliance with this section there was no imputed notice to Patton of the determination of the cause in the United States court. There is utterly no evidence to show that he had any knowledge that Kyniston was indebted or obligated in any manner whatever to the plaintiff. There is some slight testimony that there was a rumor current among the farmers in the neighborhood where the property was situated to the effect that Kyniston had been sued, but at the time Patton resided in The Dalles several miles distant, and no knowledge even of this rumor is imputed to him by any witness. In *Coolidge v. Heneky*, 11 Or. 327 (8 Pac. 281), it was decided that notice of the fraudulent intent of a grantor in cases of this sort must be actual. It is true enough that this may be proven by circumstantial evidence, but there are no circumstances disclosed by the witnesses tending to charge Patton with the necessary knowledge of the deceit, if any, practiced by his codefendant.

9, 10. We pass to the inquiry of whether Patton paid a valuable consideration for the land. To establish his case the plaintiff called as his first witness the defendant Patton himself, thus representing him to be worthy of credit, or at least not so infamous as to be

wholly unworthy of it: *State v. Steeves*, 29 Or. 85, 103 (43 Pac. 947); Greenleaf states it thus:

“When a party offers a witness in proof of his cause, he thereby in general represents him as worthy of belief”: 1 Greenl. Ev. (16 ed.), § 442.

The testimony of Patton is to the effect that on Sunday, May 17th, Kyniston visited him and offered the land for sale subject to a mortgage for one thousand dollars in favor of the state land board with accrued interest, pricing it at the sum of one thousand dollars additional, and the balance of unpaid taxes amounting to \$26.31; and that he accepted the offer. He said he had in his possession six hundred dollars belonging to his son which the latter had earned from time to time and left in his keeping, together with ninety dollars of his own, all of which he kept in a can buried sometimes in a cellar and sometimes in a woodshed at the various places where he had lived in Wasco County; that he paid this amount to Kyniston on the Sunday mentioned, taking his receipt for the same which, at the time he testified, had been lost and could not be produced; that the following morning he went to the office of an attorney where the deed was prepared and signed by Kyniston; that he then paid him \$210. The remainder of the consideration was one hundred dollars which he had previously loaned to Kyniston, making a total of one thousand dollars.

An attempt was made to discredit his testimony by showing that when he was working for a farmer, plowing a 92-acre tract for \$1.50 an acre, he drew his money substantially as fast as he earned it; that once he owed his landlord \$6 for a month's house rent and paid it by cutting wood, that in another instance he was compelled to ask credit for \$16.81 to buy feed for his team while he was cultivating rented land; and,

finally, that shortly prior to the transaction in question he borrowed one hundred dollars and gave a chattel mortgage on his team to secure its payment. These matters are satisfactorily explained by Patton's statement to the effect that at the time he was plowing he did not have ready cash and was compelled to use the money from time to time; that he did not have available funds when he owed the house rent, and, not having any work on hand, made the turn by cutting wood; and, lastly, that his wife was afflicted with cancer and he had borrowed one hundred dollars for the purpose of sending her to California for treatment, which plan she abandoned. The son testified that for practically four years he had been earning money which, from time to time, he gave to his father for safekeeping, and that it was with his consent that his parent used the money to make the initial payment to Kyniston. The latter testified to receiving the money as stated by Patton; and, finally, the scrivener, who prepared the deed and took the acknowledgment, declared that at that time he saw quite a sum of money in gold, estimated by him to be two hundred dollars or three hundred dollars, pass from Patton to Kyniston as part of the transaction.

Some unimportant discrepancies between the testimony of Patton and of Kyniston are pointed out as discrediting their statements. For instance, the former said that the subject of the transfer of the land had not been broached between them until the stated Sunday, while the latter declared that he had several times before then interviewed Patton on the subject. This circumstance, together with the fact that the greater part of the purchase money was paid before the execution of the deed, that no abstract was required or examination of the title made, and that for

a long period of time the money was kept buried in a can about the house instead of being deposited in a bank, gives an apocryphal flavor to the stories of the witnesses. On the other hand, there is nothing whatever to dispute them. The plaintiff has vouched for the credibility of Patton and, while the transaction may not have been carried on by a farm laborer, as Patton was disclosed to be, with the same precaution that would characterize a similar affair conducted by well-trained business men, the testimony clearly preponderates in favor of the defendants. The case is governed by such precedents as *Phipps v. Willis*, 53 Or. 190 (96 Pac. 866, 99 Pac. 935, 18 Ann. Cas. 119); *Ball v. Danton*, 64 Or. 184 (129 Pac. 1032); *Coffey v. Scott*, 66 Or. 465 (135 Pac. 88); *Coolidge v. Oberlin*, 66 Or. 563 (135 Pac. 167); *Lane v. Myers*, 70 Or. 376 (141 Pac. 1022, Ann. Cas. 1915D, 649).

In brief, there is nothing to show that Patton had any notice whatever that Kyniston intended to defraud anyone. It is established at least by the greater weight of testimony that he paid a valuable consideration for the land and that, too, before he had any notice either actual or imputed of any possible fraud on the part of his codefendant. The criticisms of the statements of the witnesses are not sufficient entirely to discredit them, especially where the veracity of the defendant Patton was indorsed by the plaintiff when he called him as a witness. We deem it unnecessary to consider the question urged by the defendants to the effect that without an allegation in the body of the complaint stating his appointment as trustee, words of that kind in the title are mere *descriptio personae*, so that the plaintiff is suing in his private capacity while the proof shows he is entitled to recover, if at all, only in the character of a representative.

The decree of the Circuit Court was right, and must be affirmed. **AFFIRMED.**

MR. JUSTICE EAKIN took no part in the consideration of this case.

Argued July 18, affirmed August 1, 1916.

WICKS v. SANBORN.

(159 Pac. 71.)

Appeal and Error—Law of Case—Motion for Directed Verdict.

1. Where the evidence contained in the record on a second appeal is not materially different from that produced on the first trial, the decision on the first appeal, on motion for directed verdict, that the plaintiff was entitled to have the jury pass on the evidence, is the law of the case on the second appeal.

Trial—Action on Contract—Instruction—Application to Evidence.

2. In an action by an architect for the price of house plans, an instruction that, if the jury should find that the contract between plaintiff and defendant was that if defendant did not build he was not required to pay for the plans, verdict must be for him, even though he agreed or promised to build, and yet did not do so, and that such promise, if made, did not change the contract, was properly modified by adding, "unless you should find from the evidence that it was the intention of the parties to so change the contract," where there was evidence that a change had been agreed upon.

Trial—Instructions—Province of Jury—Law Question.

3. In an action by an architect for the price of house plans ordered by a contractor acting for the owner, where the court instructed that, if the contractor was used as the medium through whom the contract was made, then both parties to the action would be bound by the terms of the contract, provided the contractor correctly represented them to the respective parties, the quoted language of the instruction, that if the jury should find from the preponderance of the evidence that the contractor was not the agent of the owner "to the extent of having power to bind him," unless he should have fully and honestly represented to the owner the full terms of the contract and then have the owner ratify them, was not improper, as permitting the jury to decide what the agent might do by virtue of his authority, a question of law for the court.

From Clatsop: JAMES A. EAKIN, Judge.

Department 2. Statement by MR. JUSTICE HARRIS.

This is the second appeal of a dispute involving \$90: See 72 Or. 321 (143 Pac. 1007). The plaintiff, John E. Wicks, alleges that he is an architect, that at the request of defendant, Frank H. Sanborn, he drew a set of plans reasonably worth \$90 for a dwelling-house, and that the defendant has refused to pay for the plans.

The answer avers that the defendant contemplated the erection of a dwelling-house, that the plaintiff agreed that he would prepare a set of plans with the understanding that the defendant would pay \$90 if he approved the plans and if he built the house, but no charge was to be made for drawing the plans if the defendant did not approve them or if he did not build.

The reply traverses the averments of the answer. The verdict of the jury was for the plaintiff, and the defendant appealed from the consequent judgment.

AFFIRMED.

For appellant there was a brief and an oral argument by *Mr. George C. Fulton*.

For respondent there was a brief over the names of *Mr. Frank C. Hesse* and *Mr. A. W. Norblad*, with an oral argument by *Mr. Hesse*.

MR. JUSTICE HARRIS delivered the opinion of the court.

The assignments of error question the refusal of the court to direct a verdict for the defendant, and also complain of the giving and refusal to give other instructions. The negotiations for the plans were for the most part conducted by plaintiff and C. L. Houston, a contractor. The controversy between the liti-

gants largely results from their variant claims concerning the authority of Houston. Wicks argues that Houston had sufficient authority to make the agreement relied upon by the plaintiff, while Sanborn contends that Houston lacked the requisite authority. A brief reference to the evidence is necessary.

The plaintiff testified that Houston "told me that Mr. Frank Sanborn had asked him to inquire from me what the cost would be for making a plan for a house that Mr. Frank Sanborn intended to build. He had with him a piece of paper, * * and that paper was laid down, * * representing the floor plan of the house. * * I told him the price would be about \$90 or \$95; so he said he was going to take it up with Mr. Sanborn and let me know a few days afterward." The plaintiff also testified that Houston returned in a few days, and said that \$90 was satisfactory to the defendant, and "to go ahead and make up preliminary drawings to be submitted to Mr. Frank H. Sanborn for his approval." Preliminary drawings were then made and turned over to Houston, who "said he was going to take it up with Mr. Sanborn." A few days afterward, at the request of the defendant's wife, Wicks went to Sanborn's home, and there discussed with the defendant and his wife the preliminary drawings, which had been turned over to Houston and by him delivered to Sanborn. According to the testimony of the plaintiff, Sanborn was satisfied with the plans, after some changes pursuant to "suggestions made back and forth," and then "Mr. Sanborn told me that he was going to take the matter under consideration, when he had gone over the preliminary drawings, and would let me know through Mr. Houston in a few days," and "in a few days afterward Mr. Houston came into my office with the same preliminary

drawings that we had discussed at Mr. Sanborn's house, and said that the arrangement was satisfactory, to go ahead with the plans." The plaintiff then completed the plans and "turned them over to Mr. Houston when finished," as "Sanborn said that Mr. Houston was to build the house by day's work and that he procured these plans for him."

C. L. Houston, when a witness for the defendant told the jury that after the preliminary plans had been submitted to Sanborn "he said 'go ahead, I am going to build the house,' " and "to have the plans completed then"; and the witness then told Wicks that Sanborn had said "that he was going to complete the house." Wicks subsequently finished the plans and delivered them to Houston.

1. On the first appeal it was held that the plaintiff was entitled to have the jury pass upon the evidence and that the trial court erred in directing a verdict for the defendant: *Wicks v. Sanborn*, 72 Or. 321, 324 (143 Pac. 1007). And since the evidence contained in the record now presented to us is almost identical with and is not materially different from the evidence produced at the first trial, the decision in *Wicks v. Sanborn, supra*, on the motion for a directed verdict, becomes the law of the case on this appeal: *Baines v. Coos Bay Navigation Co.*, 49 Or. 192, 195 (89 Pac. 371). The motion for a directed verdict was properly denied.

2. At the request of the defendant the court instructed the jury:

"If you should find from a preponderance of the evidence that the contract between plaintiff and defendant was that if the defendant did not build the house in question, that defendant was not required to pay for the plans in question, your verdict must be for the defendant, even though you should further find

that defendant agreed to or promised to build a house, yet did not do so. Such promise, if made, would not change the contract.”

And Sanborn now complains because the court modified the instruction by adding:

“Unless you should find from the evidence that it was the intention of the parties to so change the contract.”

The contention is that there was no evidence to justify the modification. We cannot agree with the defendant in his claim that the testimony of Houston that Sanborn told him he intended to build was the only evidence that could be considered in determining whether a change had been agreed upon. The discussion of the preliminary plans at the Sanborn home, and the statement by Sanborn that he would “take the matter under consideration,” and then let Wicks “know through Mr. Houston in a few days,” are by no means negligible in the consideration of the controversy, and cannot be ignored, especially when taken in connection with what Houston says Sanborn told him and what he in turn repeated to Wicks.

3. Objection is made by the defendant because the court used the words “to the extent of having power to bind him,” on the theory that the quoted words had the effect of permitting the jury to decide what an agent may do by virtue of his authority, which is a question of law for the court. The language complained of was used when the court said:

“But I instruct you that if you find, from the preponderance of the evidence, that the said C. L. Houston was not the agent of the defendant in this case to the extent of having power to bind him, unless he should have fully and honestly represented to the defendant the full terms thereof, and then have defendant ratify them, then I instruct you”

—in substance that the defendant would not be liable on an assumed state of facts. The court had previously told the jury that, if Houston was used as—

“the medium through whom the contract was made, then both parties to this action would be bound by these terms, whatever you may find them to be, provided you find that he correctly represented them to the respective parties.”

The language excepted to may appear awkward, but it did not have the effect urged by defendant, when read in the light of the whole charge, and particularly when viewed in connection with what immediately preceded it and with what followed it.

Instruction No. 6 does not attempt to leave to the jury the decision of a question of law. The court presented the theory of each litigant to the jury in a charge which on the whole has the merit of being concise and complete, and at the same time understandable, and it was not error to refuse to give the instructions numbered 3 and 4 requested by the defendant.

The jury found for plaintiff after a fair trial, and the judgment is therefore affirmed. **AFFIRMED.**

MR. CHIEF JUSTICE MOORE, MR. JUSTICE BEAN and MR. JUSTICE BURNETT concur.

Argued July 19, affirmed August 1, 1916.

RONEY v. LANE COUNTY.

(159 Pac. 73.)

Counties—Taxation—Disposition of General Taxes—Statute.

1. Under Sections 937, 6278, L. O. L., giving County Courts authority over county roads and power to tax for general county purposes, the moneys so raised may be used upon county roads, for Sections 6320, 6321, authorizing special tax levies for "building and improving" county roads is not an exclusive, but merely a supplementary, method of raising road funds.

Municipal Corporations—Taxation—Charter Provisions—Construction.

2. Eugene City Charter, Sections 114, 115, exempting the city from road taxes levied by the County Court, refers only to road taxes levied under Sections 6320, 6321, L. O. L., and is inapplicable to general taxes raised under Sections 937, 6278, although they are used for road purposes.

Counties—Taxation—Disposition of General Taxes—Statute.

3. Budget Law (Laws 1913, p. 458), requiring the County Court to publish an estimate of the amount required for each department of the county government, merely requires an estimate of how much of the general tax fund, as distinguished from the special road tax fund, will be used for road purposes.

From Lane: **GEORGE F. SKIPWORTH**, Judge.

Department 2. Statement by **MR. JUSTICE BURNETT**.

This is a suit by L. N. Roney against the county of Lane, H. L. Bown, county judge, George M. Hawley and M. H. Harlow, county commissioners, and James C. Parker, sheriff of Lane County, Oregon.

The plaintiff is a taxpayer owning taxable real and personal property located in the City of Eugene, in Lane County, Oregon. He brings this suit in his own behalf and that of all other taxpayers similarly circumstanced. That city is a municipal corporation chartered by an act of the legislative assembly of the State of Oregon entitled "An act to reincorporate the City of Eugene and to repeal all acts and parts of acts in conflict therewith," filed in the office of the Secretary

of State February 18, 1905. Sections 114 and 115 of that charter are here set down:

“The corporate limits of the City of Eugene shall embrace and the same is hereby constituted an independent road district and the power and authority given by the general laws of the State of Oregon to the County Court of Lane County, to divide said county into road districts, to appoint road supervisors, to lay out and work highways, and to levy a tax upon all taxable property of said county to be used in building and improving the county roads shall not apply or extend to the territory within the limits of the City of Eugene, but the said territory and the inhabitants thereof are hereby excepted out of the jurisdiction of said court upon said subjects; and the authority given to the County Court by general law to manage, control, and levy road poll taxes, in cash, shall be exercised within the City of Eugene by the common council thereof; and all road taxes, including road poll taxes levied upon or against the property and persons of the city of Eugene, shall be expended by the street commissioner thereof under the direction of the common council of said city, and authority is hereby given to the common council to expend such portion of the road taxes outside of the limits of the city upon the roads leading to the city as a majority of the common council shall deem expedient and advisable”: Section 114.

“Authority is hereby given to the common council to levy such tax, not exceeding two mills in any one year, as it shall deem necessary, upon all taxable property in the city, to be collected at the same time and in the same manner as the other taxes of the city: Provided, that such part thereof as the council or street commissioner shall direct may be paid in labor on the streets and roads, under the direction of the street commissioner, who shall have all the power and authority of a road supervisor under the general laws of the state”: Section 115.

The plaintiff avers that in the budget framed by the Lane County Court on December 2, 1915, under the

head of "roads," there was inserted the sum of \$110,620 to be levied upon all the taxable property in that county including that within the City of Eugene. This was incorporated with the larger amount of \$320,683.50, which is denominated in the budget "general fund"; the rate levied to raise which was 8.676 mills. He avers that the part apportioned for roads amounts to 2.79 mills. He charges that this tax was extended on the assessment-rolls and that the sheriff of the county will collect the same from the plaintiff. He prays for a cancellation of the extension, that the levy of 2.79 mills be set aside and held for naught, and that the sheriff be enjoined and restrained from collecting the same. A general demurrer to this complaint was sustained, and the suit dismissed. The plaintiff appealed.

AFFIRMED.

For appellant there was a brief over the names of *Messrs. Foster & Hamilton* and *Mr. Sjur P. Ness*, with oral arguments by *Mr. O. H. Foster* and *Mr. Ness*.

For respondents there was a brief over the names of *Mr. Joseph M. Devers*, District Attorney, and *Messrs. Thompson & Hardy*, with oral arguments by *Mr. Devers* and *Mr. Helmus W. Thompson*.

MR. JUSTICE BURNETT delivered the opinion of the court.

Section 6320, L. O. L., as amended by the act of February 23, 1915, reads thus:

"The County Court or Commissioners' Court of each county in the state may levy a tax of not to exceed ten mills on the dollar on all taxable property of said county, at the time of making the annual tax levy upon the previous year's assessment, which shall be set apart as a general road fund, to be used in the build-

ing and improving the public or county roads or bridges on county roads of the county in which the property is located. Said tax shall be paid in money, and collected in the same manner as other county taxes are collected, and when so collected shall be used for road purposes only, as provided in this act, and 70 per cent thereof shall be apportioned to the several road districts, including districts composed of incorporated cities and towns, in such proportion as the amount of taxable property in each district shall bear to the whole amount of taxable property in the county, and the remaining 30 per cent shall be applied to roads in such locality in the county as the court may direct": Laws 1915, p. 133.

Section 6321, L. O. L., provides for an additional tax to be voted by the taxpayers of a road district for the improvement of roads therein. Section 6278 here follows:

"All county roads shall be under the supervision of the County Court of the county wherein the said road is located; and no county road shall be hereafter established, nor shall any such road be altered or vacated in any county in the state, except by the authority of the County Court of the proper county; and each County Court within this state shall have the authority, and it shall be its duty, to supervise, control, and direct the working, laying out, opening, and keeping in repair of all county roads within its county, and to prescribe the methods and manner of working the same; to supervise the construction and repair of all bridges on the county roads, and to remove any supervisors for incompetency or disobedience to the orders of said court. The powers herein given may be exercised directly by the court, or through some one of its members designated for that purpose."

In addition to the authority conferred by Section 6278, L. O. L., we find in Section 937 that the County Court has powers pertaining to county commissioners to transact county business, among other things:

“(3) To establish, vacate, or alter county roads or highways within the county, or any other necessary act relating thereto, in the manner provided by law; (4) to provide for the erection and repairing, within the county, of public bridges upon any road or highway established by public authority; * * (7) to estimate and determine the amount of revenue to be raised for county purposes, and to levy the rate necessary therefor, together with the rate required by law for any other purpose, and cause the same to be placed in the hands of the proper officer for collection; * * (9) to have the general care and management of the county property, funds, and business, where the law does not otherwise expressly provide. * * ”

1, 2. The principal question to be determined is whether the County Court in the exercise of its authority defined in these sections is restricted for necessary funds to the special tax provided for in Section 6320 revised in 1915. It will be observed that the money to be raised under that section is to be used exclusively for “building and improving” the public or county roads or bridges on such roads. In *Kime v. Thompson*, 60 Or. 183 (118 Pac. 174), we held that it was not mandatory upon the County Court to exercise the authority conferred by this section; that it was merely cumulative in the matter of taxation; and that the County Court was not confined to the levy of this special tax in the furtherance of its effort to improve the highway, nor deprived of the power of applying other means to such a purpose. The general authority conferred upon the County Court by Sections 937 and 6278, and the objects of its control, include many things besides the mere building and improving of thoroughfares. In Section 6320 nothing is said about the expense of surveying or laying out roads, paying damages for property taken, or for salaries of road officers, and many other things which would naturally suggest themselves upon

detailed examination of legitimate expenses connected with the general road system of a county.

The statutory grant of authority by the legislative department of the state as above described is ample sanction for the County Court to apply to the operation of its road system money drawn from the general resources of the county independent of or in addition to the restricted levy provided for in Sections 6320 and 6321. As held in *Kime v. Thompson*, 60 Or. 183 (118 Pac. 174), the fund authorized in these latter sections is cumulative and permissive. Specific and exclusive road taxes were those from which the charter of Eugene originally exempted that municipality. They are the only funds to which the restricted designation of "road taxes" used in the city's incorporating act is applicable. All others are referable to the ordinary dominion of the county over its municipal affairs, as a branch of the government vested with the taxing power. It would cripple the general authority of the County Court if it were required to depend exclusively upon a special fund applicable alone to the mere building and improving of public roads. The special tax described in Section 6320 must perforce be apportioned among all the districts throughout the county including cities and towns in the classification therein described. The districts get 70 per cent whether needed or not. The county has only 30 per cent and is restricted in its disbursement to mere building and improvement. None of that money is applicable to any other of the numerous expenses necessarily incident to road matters. The thickly populated centers would have money to waste while the outlying highways would become impassable for want of means to repair them and new roads would be out of the question. It is not reasonable to construe Sec-

tion 6320 so as to make it a hobble instead of a help to the county in its progress toward good roads. It was evidently intended to supplement the general resources of the county and was not designed to contract them. The conclusion that the county may finance its road system with money raised by general taxation and is not compelled to resort to the additional scheme authorized by Sections 6320 and 6321 renders it unnecessary to determine whether the charter provisions already quoted are superseded by the general law embodied in the latest form of Section 6320 contemplating distribution of money among cities and towns which happen to be separate road districts as well as among rural districts.

3. The question is not affected by Chapter 234 of the Laws of 1913, known as the "Budget Law," which requires the County Court to publish beforehand an estimate fully itemized showing under separate heads the amount required for each department of the county government, among other things, for the improvement and maintenance of public highways, roads, streets, bridges, the construction, operation, and maintenance of each public utility, etc. Having reached the conclusion in *Kime v. Thompson*, 60 Or. 183 (118 Pac. 174), that the County Court has the right to use the general fund for road purposes it is plain that the budget law merely requires an estimate of how much of that general fund, as distinguished from the special fund named in Section 6320, will be expended for that purpose. In short, the general fund is derivable from taxation upon all taxable property within the county wherever situated. It may be applied to the operation of the road system of the county. The portion thus used is not technically a road tax, which term may be

applied in strictness only to the levy authorized by Sections 6320 and 6321.

The demurrer to the bill was properly sustained and the decree is affirmed. AFFIRMED.

MR. CHIEF JUSTICE MOORE, MR. JUSTICE BEAN and MR. JUSTICE BENSON concur.

MR. JUSTICE HARRIS and MR. JUSTICE EAKIN took no part in the consideration of this case.

Argued July 7, affirmed August 1, 1916.

BALDWIN CO. v. SAVAGE.*

(159 Pac. 80.)

Appeal and Error—Review—Findings of Fact by Trial Court—Conclusiveness.

1. The findings of fact by the trial court on conflicting oral testimony, while not conclusive on appeal, are entitled to great weight.

Bills and Notes—Mortgages—"Duress"—Threats of Imprisonment.

2. Evidence held sufficient to sustain a finding that notes and mortgages should be set aside as procured by "duress" and executed under threats that defendants' son would be sent to the penitentiary for embezzling money while agent of the mortgagee.

Bills and Notes—Mortgages—Validity—Duress—Threats of Imprisonment.

3. Notes and mortgages, given by parents under the influence of threats that otherwise their son will be sent to the penitentiary for embezzlement of moneys of the mortgagee, are voidable for duress.

[As to recovery of money paid under duress, see note in 94 Am. St. Rep. 419.]

Mortgages—Validity—Duress—Threats of Imprisonment.

4. Where defendants to save their son from the penitentiary, executed notes and mortgages in payment of money embezzled by him, the taking by them of a chattel mortgage from such son as partial

*For authorities passing on the question of validity of mortgage procured by threats of prosecution of relative, see note in 20 L. R. A. (N. S.) 484. REPORTER.

indemnity, on the suggestion of the mortgagee's agents, does not estop them from interposing the defense of duress in an action to foreclose the real estate mortgages.

Mortgages—Foreclosure—Defenses—Duress—Waiver—Evidence—Sufficiency.

5. Evidence *held* insufficient to warrant a finding that defendants waived their defense of duress to the foreclosure of mortgages by securing a postponement of the trial by promising to pay the amount.

Mortgages—Foreclosure—Defenses—Duress—Estoppel.

6. In foreclosure, defendants are not estopped from asserting the invalidity of the mortgages by reason of duress, consisting of threats to imprison their son for embezzlement by the payment of a chattel mortgage after the statute of limitations, Section 1377, L. O. L., had barred the prosecutions of such son.

Payment—Voluntary Payment in Discharge of Voidable Obligation—Recovery.

7. A payment, voluntarily made in the discharge of a note and mortgage, cannot be recovered although the note and mortgage were procured by duress, consisting of threats of imprisonment.

From Marion: WILLIAM GALLOWAY, Judge.

Department 2. Statement by MR. CHIEF JUSTICE MOORE.

This is a suit by the Baldwin Company, a corporation, against J. F. Savage and Margaret Savage, L. F. Savage, W. E. Savage and Alwilda Savage, and James Withycombe, Ben W. Olcott and Thos. B. Kay, constituting the state land board, to foreclose a mortgage and to recover the amount of four promissory notes, the payment of which was thus undertaken to be secured. The admitted facts, respecting the execution of this mortgage and of other securities, are that the plaintiff is a corporation engaged in manufacturing and selling musical instruments. The company delivered to the defendant L. F. Savage, its local agent at Salem, Oregon, pianos which he was to sell at stipulated prices, retain a specified commission, and pay over the remainder to his principal. In April, 1913, O. A. Berger, the plaintiff's general agent, visiting

Salem, discovered that Savage had sold goods so delivered, receiving therefor more than \$2,000, which sum he unlawfully appropriated and was unable to repay any part thereof. After several days' effort Berger secured from such local agent and from his father, the defendant J. F. Savage, their promissory notes for the sum so misappropriated. The officers of the plaintiff's Pacific Coast agency at San Francisco, California, refused to accept these notes, and demanded that they should be secured. For that purpose E. J. Jorgenson, a representative of the company, called upon L. F. Savage, and on June 25, 1913, procured from him and from his father their new promissory notes, one for \$552, payable October 5th of that year, and three others, each for the sum of \$515 and maturing, respectively, April 5, 1914, August 5th and December 5th of the latter year, with 8 per cent interest per annum. In order to secure their payment J. F. Savage and his wife, the defendant Margaret, the mother of the defendant L. F. Savage, executed to the plaintiff a mortgage of 30 acres of land in Marion County, Oregon, which sealed instrument was duly filed for record. At the time this security was given, Berger, again visiting Salem, detected another misappropriation by his local agent, amounting to \$601, to evidence which debt J. F. Savage, on June 28, 1913, also gave the plaintiff his promissory note, maturing December 24th of that year, and secured the same by a chattel mortgage of eight horses and ten cows. As partial indemnity for the liability thus assumed, L. F. Savage, on June 30, 1913, executed to his father a promissory note for \$1,000, maturing in a year, with 8 per cent interest, and to secure the payment thereof also gave a chattel mortgage upon two horses, one express wagon, one buggy, and one electric piano, which mortgage was duly filed.

About July 26, 1913, the plaintiff took from L. F. Savage all its goods then in his possession and discontinued his agency. When the first promissory note secured by the realty mortgage was about due, an agreement was entered into by the plaintiff and J. F. Savage, at his request, whereby it was stipulated that the chattel mortgage note might be paid off in lieu of such first note, the maturity of which was thus deferred until December 24, 1913.

This suit was commenced December 19, 1913, prior to the maturity of the first note, the payment of which had been deferred until the 24th of that month. A supplemental complaint, in the usual form, was filed May 10, 1915, alleging that no payments had been made on the realty mortgage notes. The answer of the defendants J. F. Savage and Margaret Savage denies some of the averments of the complaint, and for a further defense alleges, in substance, that prior to and on June 25, 1913, the plaintiff's agents accused the defendant L. F. Savage of having converted to his own use about \$2,100 belonging to the company, thereby rendering himself liable to a criminal prosecution for a felony, which action would be instituted unless J. F. Savage would repay that sum to the plaintiff or execute to it promissory notes evidencing that amount; that, believing such representations to be true, and that the threat would be executed unless complied with, he, while laboring under the fear and duress caused by the menace, executed the four promissory notes mentioned in the complaint; that thereafter the plaintiff's agent represented to the defendant J. F. Savage and to his wife that their son would be prosecuted in the criminal courts of this state for the misappropriation of such sum of money unless they executed to the plaintiff a mortgage of the real property described in the com-

plaint to secure the payment of the four promissory notes; that under the impulse of such threat they executed the real estate mortgage; and that the lien thus undertaken to be created constitutes a cloud upon the title to such land. For a second defense the execution of the chattel mortgage and note is alleged to have been procured under the same threat as in the first instance; that J. F. Savage paid to the plaintiff \$601, the sum named in the chattel mortgage note, and interest thereon, while laboring under the threats that his son would be prosecuted for the commission of a felony unless such payment were made. The answer prays that the notes and the realty mortgage be set aside, and that the answering defendants recover from the plaintiff the sum of \$601 so paid on account of the chattel mortgage.

The reply put in issue the allegations of new matter in the answer, and further averred that the promissory notes mentioned were executed in consideration of extending to the defendant L. F. Savage further time within which to pay his indebtedness to the plaintiff. For a further reply it is alleged that the defendants ought to be estopped to set forth the separate defense relied upon for that they paid the amount due on the chattel mortgage note, and that after some of the notes secured by the real estate mortgage had become due, they, with full knowledge of all the circumstances and conditions hereinbefore set forth, ratified the contract, and promised to pay the amount of such notes in consideration of an extension of time for the payment thereof. Based on these issues, the cause was tried, resulting in a decree canceling the notes and mortgage sued on herein, but refusing to award a repayment of any part of \$601 received on account of the chattel

mortgage note. From this decree the plaintiff and the answering defendants separately appeal. **AFFIRMED.**

For appellant there was a brief and an oral argument by *Mr. Walter C. Winslow*.

For respondents there was a brief over the names of *Messrs. McNary & McNary* and *Mr. Everil M. Page*, with an oral argument by *Mr. Charles L. McNary*.

Opinion by MR. CHIEF JUSTICE MOORE.

The defendant J. F. Savage testified: That Mr. Berger, the plaintiff's general agent, telephoned from Salem, Oregon, to the farm where the witness lived, informing him that his son had appropriated money not his own, thereby rendering himself liable to prosecution. That the following morning the witness went to Salem, where Berger told him his son would be prosecuted by the plaintiff if he did not get security or repay the money which he owed it. That prior thereto the witness had no knowledge of his son's failure to keep his contract with the plaintiff, and the information shocked him so that he could scarcely talk, and was thereby induced to execute the first promissory notes. That several weeks thereafter Mr. Jorgenson telephoned the witness from Salem, saying the plaintiff could not accept the notes that had been delivered to it, and that security therefor must be given. That the next day the witness went to the city and met this representative of the company, who also informed him that his son had misappropriated the plaintiff's money, thereby rendering himself liable to a criminal action, and he would be prosecuted therefor unless a mortgage were executed. That after spending the day at Salem he had to return to his home to milk the cows, whereupon Jorgenson said to the witness:

“Father, come on and go; we will care for the boy [meaning L. F. Savage] until you can get back tomorrow morning.”

That on the succeeding day the witness again returned to the city, where the mortgage was prepared and Jorgenson returned with him to his home; that after arriving at such place Jorgenson was called to the phone, and, turning to the witness, said:

“What do you know about that? There’s another piano that we just now heard from. Mr. Berger has just now found out \$600 for another piano.”

That the real estate mortgage was executed the next morning, and the chattel mortgage given three days thereafter, and that these securities were given to save his son from being sent to the penitentiary.

The defendant Mrs. Margaret Savage testified that Mr. Jorgenson visited their farm home, bringing the mortgage with him; that she knew all about the execution of that instrument which was given to save her son; that, referring to this security, she said to Mr. Jorgenson, “I hate awfully bad to do this, but I would have to do it.”

F. L. Pound, a notary public, who took and certified to the acknowledgement of the realty mortgage, testified that in the presence of Mr. Jorgenson Mr. Savage said, “I didn’t think I would ever be called upon to sign any such paper”; that Mrs. Savage said to the witness she hated to sign the mortgage; didn’t feel like signing it. In answer to the question, “Did she say anything about that it was for her son, or anything?” Mr. Pound replied: “Yes, it was to save their son; they both said that; it was to save their son, that they did it.”

O. A. Berger, appearing for the plaintiff, was asked by its counsel:

“At that time, you heard the testimony of Mr. Savage here, as to certain threats that were made against him if this wasn’t fixed up and these notes signed—that the company would prosecute Frank [L. F. Savage]; now what is the fact about that?”

The witness answered:

“Why, I don’t recall making any threats whatsoever, Mr. Winslow, to Mr. J. F. Savage, or anyone.

“Q. Well, did you make those threats to anyone?

“A. No, sir.

“Q. Now, when you say you don’t recall that, what do you mean?

“A. Well, in fact, I will say that I didn’t make any threats. I said to Mr. J. F. [Savage] that Frank violated the terms of his contract.”

E. J. Jorgenson, in answer to the inquiry of the plaintiff’s counsel, “Was there any intimation or insinuation that if the deal [the execution of the realty mortgage] was not fixed up criminal proceedings would be had?” said, “Not in the least.”

1, 2. It will thus be seen there is a decided conflict in the testimony on the question of threats respecting the prosecution of L. F. Savage upon a criminal charge. The trial court saw the witnesses and was thereby afforded an opportunity to note their appearance, manner of testifying and bearing while under examination, which personal observation is vastly superior to that enjoyed by this court from a mere examination of a typewritten copy of the questions asked, and the answers given. The conclusion thus reached by that court, though not controlling on appeal, is entitled to great respect, and particularly so when it is remembered how Mr. Berger at first hesitated when asked about any threats that had been made. We conclude, therefore, that such threats were made, and that the parents of L. F. Savage, fearing the consequences of his misappropriation of the plaintiff’s money which

was intrusted to him, were ready to do anything in their power to prevent their son from being convicted upon a criminal charge, and in consequence thereof suffering imprisonment in the state penitentiary.

3. The question to be considered is whether or not the threats of the plaintiff's agents which were made to J. F. Savage and his wife to have their son prosecuted in a criminal action upon a charge of embezzlement unless the sums of money which were conceded to have been misappropriated by him were either paid or secured so worked upon and affected the minds of his parents as to destroy free agency and to compel them, without their own volition, to execute the notes and mortgage described in the complaint.

“Duress is that degree of constraint or danger, either actually inflicted or threatened and impending, which is sufficient in severity or in apprehension to overcome the mind of a person of ordinary firmness. It consists not merely in the act of imprisonment or other hardship to which the party was subjected, but in the state of mind produced by those circumstances, and in which the act sought to be avoided was done”: 9 Cyc. 443.

See, also, *Parmentier v. Pater*, 13 Or. 121 (9 Pac. 59); *Ross v. Ross*, 21 Or. 9 (26 Pac. 1007); *Schoellhamer v. Rometsch*, 26 Or. 394 (38 Pac. 344); *Rostein v. Park*, 38 Or. 1 (62 Pac. 529); *Kester v. Kester*, 38 Or. 10 (62 Pac. 635); *McNair v. Benson*, 63 Or. 66 (126 Pac. 20); *Guinn v. Sumpter Valley Ry. Co.*, 63 Or. 368 (127 Pac. 987); *Hunt v. Hunt*, 67 Or. 178 (132 Pac. 958, 134 Pac. 1180); *Horn v. Davis*, 70 Or. 498 (142 Pac. 544).

4. A text-writer in discussing this subject observes:

“Duress of the person may be accomplished by unlawful imprisonment or violence. This unlawful imprisonment or violence may be directed directly against the other party to the contract, or the husband or wife,

parent or child or other near relative of such party": Elliott, Cont., § 140.

Parental love will usually prompt a father or mother to make great sacrifices for a son or daughter, particularly so when such child is threatened with impending danger. In order to avoid the shame and disgrace which the trial of an offspring, charged with the commission of a crime, will necessarily entail, his father and mother will ordinarily impoverish themselves to avoid an indictment or a conviction. Threats, when based upon admitted facts which would render a parent subject to a criminal prosecution and judgment therein, will not usually affect him so much as when a similar charge is preferred against his son or daughter. When, however, such threats are made to a parent against his offspring the menaces will generally produce such apprehensions of evil as to overthrow reason and judgment and to induce the making of a contract whereby the father or mother is ready to make any surrender of right or property to avert the calamity and protect the child. The court in *Meech v. Lee*, 82 Mich. 288 (46 N. W. 398), discussing this subject say:

"No more powerful and constraining force can be brought to bear upon a man to overcome his will, and extort from him an obligation, than threats of great injury to his child. Both upon reason and upon the weight of the authorities we are of opinion that a parent may void his obligation by duress to his child."

To the same effect, see, also, *Foley v. Greene*, 14 R. I. 618 (51 Am. Rep. 419). Transactions consummated under the supposed circumstances, affecting such rights, are voidable by reason of the duress which impelled their execution.

It is believed the weight of the testimony conclusively shows that the execution of the notes and mortgage

was actuated by the threats of the plaintiff's agents, thereby rendering such apparent evidence of indebtedness and the security given for the payment thereof voidable.

The remaining question is whether or not J. F. Savage and his wife are estopped by their conduct from interposing the defense relied upon in this suit. It will be remembered that L. F. Savage, by way of partial indemnity, gave to his father a promissory note for \$1,000, and undertook to secure the payment thereof by a chattel mortgage. The testimony shows that no payment had been made on this obligation, and that this note and mortgage were executed at the suggestion of the plaintiff's agents. Such being the case, it will be assumed, without deciding the question, that their principal was not prejudiced thereby and in no manner changed its attitude toward the answering defendants in consequence thereof, though the company might possibly have had the mortgage of L. F. Savage executed to it. But, however this may be, the conduct relied upon was that of the plaintiff, and no estoppel can arise by reason thereof as against the defendants.

5. It is maintained that the trial of this suit was postponed in consideration of the promise of J. F. Savage to pay the amount of the notes. To substantiate this contention reliance is had upon that defendant's testimony, an examination of which induces the belief that it is not sufficient for that purpose.

It is insisted by plaintiff's counsel that J. F. Savage paid off the chattel mortgage note before it matured, and at a time when he knew, as he now asserts, that the execution of this evidence of indebtedness was induced by threats, and, this being so, he ratified both mortgage contracts, and by reason thereof is estopped

to allege or prove any facts to the contrary. A similar contention was made in the case of *Bentley v. Robson*, 117 Mich. 691, 697 (76 N. W. 146, 149), where it is said:

“The record shows the learned circuit judge was justified by the record in most of his findings of fact. It is impossible to read the record without coming to the conclusion that Mrs. Bentley understood when she gave the mortgage that her husband was in the custody of the officers, and that to save him from being conveyed to jail it was necessary for him to give the mortgage which she executed. It was this motive which actuated her to make it. There is nothing in the record to indicate it would have been made had she not believed it would have this effect. The case comes clearly within the principles established by the following decisions (citing cases). The court was right in holding the mortgage was tainted with duress. It is now said, even conceding the mortgage was obtained by duress, it was ratified after the duress had passed by making payments upon it, and by attempting to have it discounted. The conclusion we reach from the record is that the wife and family did all that was done in the expectation and belief that it was necessary to be done to save Mr. Bentley from being imprisoned as the result of his criminal act. What was done after the mortgage was given was in the same line as the giving of the mortgage, prompted by the same motive, expecting to bring about the same result.”

6. The punishment of an agent convicted of embezzlement is the same as that upon a conviction for larceny: Section 1955, L. O. L. A criminal action for any felony, other than murder or manslaughter, must be commenced within three years after its commission: Id., § 1377. When the plaintiff's money was converted by L. F. Savage to his own use does not appear, nor is it manifest when the duress was removed. If it be

assumed, however, that the statute of limitations had run against the crime when the chattel mortgage note was discharged, and that such liquidation was not induced by fear that the threat to prosecute L. F. Savage could be executed, the settlement of that obligation was no payment of any part of the realty mortgage, and, this being so, no estoppel can arise from such conduct in respect to a different voidable contract.

7. It will be remembered that an appeal was taken from that part of the decree which denied a recovery of the money expended in liquidating the chattel mortgage note. As that payment was voluntarily made, it cannot be recovered: *Holmes v. Riggs*, 52 Or. 334 (97 Pac. 551).

The decree should be affirmed, and it is so ordered.

AFFIRMED.

MR. JUSTICE BEAN, MR. JUSTICE BENSON and MR. JUSTICE HARRIS concur.

Argued July 5, affirmed August 1, 1916.

BERRIDGE v. MARION COUNTY.

(159 Pac. 628.)

Counties—Audit of Books—Powers of Insurance Commissioner—Time of Audit.

1. Under Laws of 1913, page 546, Section 10, providing that the insurance commissioner shall at least once each year make a careful audit of books of each county, such officer is not restricted to making examination for an entire year.

Certiorari—Scope of Writ—Questions of Law.

2. A writ of review is an appropriate proceeding to present questions of law arising in relation to a disputed claim against the county after it has been presented and disallowed.

Certiorari—Scope of Review—Record—Evidence.

3. On re-examination on writ of review, the court will not consider evidence outside the record, unless it was submitted to the inferior tribunal prior to its decision.

Certiorari—Scope of Writ—Questions of Law.

4. The question of law whether the state insurance commissioner may contract for audit of county books without assurance that county will pay therefor, so as to render the county liable for the expense, in view of Laws of 1913, page 545, as to audits, may properly be raised by writ of review directed to the order of the County Court disallowing the claim.

[As to persons entitled to prosecute writ of *certiorari*, see note in 103 Am. St. Rep. 110.]

From Marion: WILLIAM GALLOWAY, Judge.

Department 2. Statement by MR. JUSTICE BEAN.

This is a proceeding by Arthur Berridge against Marion County, County Court of the State of Oregon for Marion County, and Max Gehlhar, clerk of said court, by a writ of review to re-examine the action of the County Court of Marion County in disallowing the claim of plaintiff for auditing the books and accounts of that county amounting to \$1,523.11. Upon the return to the writ the trial court dismissed the proceeding. Plaintiff appeals. AFFIRMED.

For appellant there was a brief and an oral argument by *Mr. Samuel T. Richardson*.

For respondents there was a brief over the names of *Mr. George G. Bingham* and *Mr. Ernest R. Ringo*, District Attorney, with an oral argument by *Mr. Bingham*.

MR. JUSTICE BEAN delivered the opinion of the court.

Plaintiff submitted to the County Court the following claim:

Portland, Oregon, Nov. 30, 1914.		
Marion County, Oregon, to Arthur Berridge & Co., Dr.		
Date.	Nature of Claim.	Amount.
For auditing county books from Jan. 1, 1914, to Sept. 30, 1914		\$1,523 11
Details as follows:		
Time:		
L. E. Thompson 55 days at.....	\$10 00	\$ 550 00
Harry Stopp 59 days at.....	10 00	590 00
E. H. Collis 11½ days at.....	10 00	115 00
Arthur Berridge 6½ days at.....	10 00	65 00
		<hr/>
		\$1,320 00
Subsistence:		
Thompson	60 00	
Stopp	65 00	
Collis	18 20	
Berridge	7 85	\$ 151 05
		<hr/>
Transportation:		
Thompson	3 00	
Stopp	3 00	
Collis	13 00	
Berridge	7 10	26 20
		<hr/>
Typewriting reports, etc.....		25 86
		<hr/>
		\$1,523 11

This claim was duly verified, and the same certified to by the state insurance commissioner. It is alleged in the petition for the writ that on September 12, 1914, under the provisions of Chapter 286 of the General Laws of 1913, the state insurance commissioner employed the plaintiff as an expert assistant to make an audit for him of the books and accounts of Marion County for the year 1914, and “agreed to and fixed your petitioner’s services therefor at \$10 per day therefor, with railroad fare and subsistence for your petitioner and assistants that your petitioner might require to assist your petitioner in said work, together with the expense of making typewritten reports in triplicate of said auditing. That the said wages so agreed were reasonable in amount and of the amount that is usually charged and paid to persons having the qualifications of your petitioner and of the persons

employed by your petitioner to audit the said books and accounts of said county of Marion.”

It appears that the plaintiff was occupied for six and one-half days in making the audit, and employed other assistants to expert the books. The record does not disclose that the claim is made for an audit of the county accounts by the state insurance commissioner. It seems that the only connection that official had with the transaction was to employ plaintiff and make an agreement as to his compensation and that of his assistants, and that by virtue of this delegation of authority the plaintiff in turn engaged other experts, for what compensation is not stated. The commissioner also certified the account rendered by the plaintiff, but it does not appear that the commissioner was responsible in any way for the audit or vouched for the same. On the other hand, as shown by the return, that officer advised the County Court as follows:

“In connection with the inclosed claim for services rendered by Arthur Berridge & Co. in the matter of the examination of the accounts and financial affairs of Marion County, I advise that there was no definite arrangement made whereby they were to be paid for the subsistence of the men engaged upon the work. Railroad fare was to be allowed from Portland to county seat and return but once. It was understood that we would approve the subsistence expenses if it met with the approval of the County Court and the cost of the work was within reason. In this case it appears that more time was spent in detail work than was necessary, and, as the cost of the actual service is high, I do not recommend that subsistence expenses be allowed them. * * ”

1. The County Court evidently had before it the report of the experts showing for what years or period and by whom the county affairs were audited. That report is not before us. The claim as presented by

the record is not made for an official service under the provisions of Sections 10 and 11 of the act of 1913 in making an audit by the state insurance commissioner of the books and accounts of the county. It is contended on behalf of defendants that the insurance commissioner was not authorized to make an audit of the county books for a portion of the year, or oftener than one a year. The language employed in Section 10 of the law that "the state insurance commissioner shall at least once each year make a careful audit of the books and accounts of * * each county of the state," indicates that such official is not restricted to making such an examination for an entire year. The contract set forth in the petition by virtue of which the claim is made against the county was not authorized by the law of 1913, nor by any official of the county. This case is governed by the ruling in the companion case of *MacKenzie v. Douglas County*, *post*, p. 442 (159 Pac. 625), in which an opinion has this day been rendered, and the remarks made therein in considering the law of 1913 need not be repeated here.

2-4. Defendants' counsel suggest that plaintiff's remedy, if any, is by an action at law. A writ of review is an appropriate proceeding to present questions of law arising in relation to a disputed claim against a county after the same has been presented and disallowed: *Flagg v. Columbia County*, 51 Or. 172 (94 Pac. 184); *Houser v. Umatilla County*, 30 Or. 486 (49 Pac. 867.) On re-examination on writ of review the court will not consider evidence outside the record, unless it was submitted to the inferior tribunal prior to its decision: *Curran v. State*, 53 Or. 154 (99 Pac. 420). We hold that the question of law involved herein is properly raised in this proceeding.

For the reason given in the Douglas County Case, the judgment of the lower court is affirmed.

AFFIRMED.

MR. CHIEF JUSTICE MOORE, MR. JUSTICE BURNETT and MR. JUSTICE HARRIS concur.

Argued June 30, affirmed July 25, modified on rehearing September 12, 1916.

CARLTON LUMBER CO. v. LUMBER INS. CO.

(158 Pac. 807; 159 Pac. 969.)

Insurance—Fire Insurance—"Blanket Policy."

1. A blanket policy of fire insurance covers to its full amount every item of property described in it, and, if the loss of any portion of the property exhausts the full amount of the policy, the whole insurance must be paid; hence the existence of an average clause in a blanket policy involves a contradiction of terms (citing Words and Phrases).

Reformation of Instruments—Insurance Policy—Evidence—Sufficiency.

2. Where plaintiff, lessee of a sawmill, installed new equipment and took out insurance policies thereon, evidence held sufficient to require reformation of such policies by striking therefrom an average clause, thus making them a "blanket policy."

Insurance—Reformation of Policies—Carelessness of Insured in Examining Policies.

3. The carelessness of the insured in not examining insurance policies, held not of such character as would prevent the reformation of the policy by striking therefrom an average clause, thus making the policy a blanket policy.

[As to right of insurer to rely on conditions in fire insurance policy not issued in accordance with oral contract, see note in Ann. Cas. 1914D, 653.]

From Multnomah: **WILLIAM N. GATENS, Judge.**

Department 1. Statement by **MR. JUSTICE McBRIDE.**

This is a suit by the Carlton Lumber Company, a corporation, against the Lumber Insurance Company,

a corporation, to reform two insurance policies issued by the defendant, covering new equipment added by plaintiff to the sawmill plant at Carlton, Oregon; each policy being for the sum of \$5,000. The plaintiff was the lessee of the Carlton Consolidated Lumber Company, and by the terms of its lease was required to and did carry \$200,000 insurance for the benefit of its lessor. The two policies involved in this suit were for its own account and intended with other insurance, to cover the new equipment added by plaintiff. The first policy was issued in February, 1914, and contained an average clause reading as follows:

“Insurance under this policy is hereby understood to attach to each of the above locations, namely, sawmill, sawmill engine-room, resaw sheds and equipment, sorting-works, lumber-stacker, planing-mill, and general plant, in the proportion that the value of new equipment at each location bears to the total value of the new equipment at all locations.”

The second policy, actually issued September 14, 1914, but to take effect as of July 30, 1914, contained a similar average clause. A fire occurred in the plant on August 12, 1914, injuring and destroying the new equipment to the extent of the total insurance thereon. The only written evidence of the second contract of insurance here mentioned is contained in a letter written by plaintiff's agent to defendant and is dated July 30, 1914, being as follows:

“July 30, 1914.

“Mr. Philip Buehner, Portland, Oregon.

“Dear Sir:

“Carlton Lumber Co., Carlton, Oregon.

“Confirming my conversation with you this afternoon, this is to advise you that we are protecting \$5,000 additional on your blanket form covering new improvements situated anywhere on the plant. Please accept this letter as sufficient evidence that you are properly

protected. We understand that this insurance attaches according to the wording attached to our policy #94713 for \$5,000, dated February 3d. We understand that the forms are being adjusted, and I shall see you Saturday and talk this situation over with you fully. Thanking you for this additional business, we are,

Yours truly,

“LUMBER INSURERS’ GENERAL AGENCY.

“WALTER S. JELLIFF.”

The controversy between the parties is this: Plaintiff contends that after taking the inventory in July, 1913, it was found desirable to take out further insurance upon equipment, and that it was also desirable, for reasons which are stated in the opinion, to eliminate the average clause from the February policy issued by defendant so as to have all its policies correspond, in fact, to make them all “blanket” policies; that plaintiff’s president, Mr. Buehner, discussed this with Mr. Jelliff, defendant’s general agent in Portland, and it was agreed that Jelliff should prepare a new form of rider covering plaintiff’s wishes in this respect, and that plaintiff should take the \$5,000 policy in the defendant company; that such form of rider was actually prepared by Mr. Jelliff and agreed to by Mr. Buehner and the premium paid on the new policy; that the amended form of rider was given by Buehner to Jelliff at the latter’s request with the intention and expectation that it would be attached to the February policy and to the one then to be issued, but that by mutual mistake or oversight it was not substituted on the February policy, nor upon that issued as of July 30, 1914, and on the contrary the average clause was retained in both, being overlooked by plaintiff. The case was put at issue by appropriate denials, and upon the trial there was a decree for plaintiff re-

forming the policies as prayed for, from which the defendant appeals.

AFFIRMED. MODIFIED ON REHEARING.

For appellant there was a brief over the name of *Messrs. Veazie, McCourt & Veazie*, with an oral argument by *Mr. J. C. Veazie*.

For respondent there was a brief and an oral argument by *Mr. James G. Wilson*.

MR. JUSTICE MCBRIDE delivered the opinion of the court.

The whole controversy turns upon the agreement as to the elimination of the average clause. It is important here for this reason: Plaintiff was partly insured in other companies not having this average clause, but containing a stipulation that in case he should take out other insurance by policies containing an average clause the first insurers should be entitled to share the benefits of such averages. Without going into the details of the various negotiations in regard to the policy issued as of July 30, 1914, and covered by the letter dated July 30, 1914, heretofore quoted, we are of the opinion that the contract between the parties was for a blanket policy eliminating the average clause not only as to that policy, but from the rider in the February policy. Otherwise the letter quoted can have no meaning.

1. The existence of an average clause in a blanket policy would involve a contradiction of terms. A blanket policy is defined by the Supreme Court of Connecticut as follows:

“The characteristic features of a blanket policy are well understood. Its very essence is that it covers to

its full amount every item of property described in it. If the loss upon one portion or item of the property exhausts the full amount of the policy, the whole insurance must be paid; there can be no apportionment of it. In the absence of a prorating clause, one blanket insurer among many insurers, whether blanket or specific, may be sued, and he must pay the whole loss if it is not in excess of his policy. His payment will give him certain equitable rights of contribution as against his coinsurers, but his legal obligation to pay the assured cannot be questioned. The contract holds him to that. These principles are elementary: 3 Joyce, Insurance, § 2492; 1 May, Insurance (3 ed.), § 13; Ostrander, Fire Ins., § 204''; *Schmaelzle v. London etc. Ins. Co.*, 75 Conn. 397 (57 Atl. 863, 96 Am. St. Rep. 233, 60 L. R. A. 536).

See, also, *Scottish Union & National Ins. Co. v. Moore Mill & Gin Co.*, 43 Okl. 370 (143 Pac. 12); and generally Words and Phrases, title "Blanket Policy." The evidence of Mr. Buehner and of Mr. Jelliff agrees this far: That Jelliff was soliciting the last policy of insurance; that Mr. Buehner was dissatisfied with the form of defendant's policy theretofore issued; and that Jelliff prepared a form of rider eliminating the average clause, which would in effect have made the policies blanket policies, and gave several copies of it to Buehner. Jelliff says that the form was merely tentative and was not accepted by Buehner, but held up until he could consult Mr. Epper-son of the Lumbermen's Underwriting Alliance, at Kansas City, in regard to it, which institution also held policies upon substantially the same property. Buehner testifies that the contract was to go into effect at once and that Jelliff came to his office and got the form he had himself prepared and which they had agreed upon for the purpose, as Buehner supposed, of preparing riders for the policy to be is-

sued and for the one already in force. We are of the opinion that Buehner's version of the transaction is the correct one, and that the letter of July 30, 1914, while vague in some particulars, can be explained on no other theory. The words, "Confirming my conversation with you this afternoon, this is to advise you that we are protecting \$5,000 additional on your blanket form covering new improvements," etc., are significant. There was no other blanket form except the one under consideration, the one that Jelliff had prepared and retaken from Buehner's office, and it is hardly probable that the letter would have been written referring to this form and informing Buehner that the insurance would be under it if he had not already agreed with Buehner in regard to it. The further words, "Please accept this letter as sufficient evidence that you are fully protected," would have been false upon their face if it were the intent of the writer to notify Buehner that the policy to be issued would contain the average clause, the objection to which was that it would not fully protect him. The additional words, "We understand that this insurance attaches according to the wording attached to our policy No. 94713 for \$5,000, dated February 3d," are somewhat ambiguous; but the meaning of the preceding language is clear, and it is probable that the clause last quoted did not clearly express the writer's meaning. The subsequent words, "We understand the forms are being adjusted, and I shall see you Saturday and talk the situation over with you fully," would indicate that the preceding words quoted, "According to the wording attached to our policy No. 94713," were intended to apply prospectively to that policy as it would appear when the new form agreed upon had

been prepared. Else why speak of adjusting forms if only one form remained to be prepared or adjusted?

It is urged that a letter written by Mr. Buehner to Mr. Epperson supports Jelliff's claim that the blanket form prepared by him had not been accepted by plaintiff. The substance of the letter is as follows:

"Inclosed please find a form that we have taken up with the local office here in regard to the plant account and the lumber in and about the mill, which takes the mill rate. As you no doubt know, the Carlton Lumber Company leased the mill of the Carlton Consolidated Lumber Company with the understanding that all new machinery and all additions to the plant must be put in by the Carlton Lumber Company, and that we must carry our own insurance covering this improvement. We have a book in which we have all the items enumerated, which covers the cost of the plant that the Carlton Lumber Company has put in, in order to enable us accurately to ascertain at any time, in case of fire, the cost of the work that the Carlton Lumber Company has put in and all records up to date. I would ask you whether you think it would be advisable to make a copy of this list, which would mean five or six pages, and attach it to the policies, as we do not care to have any dispute in case of fire. We intend to place the insurance on the lumber in the dry shed, planer shed, dry kilns, and all the lumber in and about the mill, in one policy with one company, and we would like to do the same with our plant account, putting it, say, with one or two companies, having all the forms exactly the same. Our plant account, including the stable plant, is about \$35,000, with some deductions on account of foundations and support."

The only suggestion asked in this letter is as to whether it would be advisable to attach a list of new machinery and additions to the plant to their policies. There is not one word in it asking for any suggestion as to the form of rider inclosed, and the letter is more

a notification to these people of the form of rider the insurer proposed to adopt respecting all insurance than a request for advice, except as to a matter not connected with the form. The answer indicates that Mr. Epperson so understood it. He makes no suggestion as to the form of rider, but does make a suggestion as to the matter of attaching lists of the property to the policies, and intimates a desire to participate in future insurance.

2. Much as we should desire for the satisfaction of counsel to discuss in detail the evidence, both oral and written, upon which we base our conclusions, it is impossible to do so and compress our opinion into any reasonable space. The discussion of it in the appellant's brief consumes what would be the equivalent of 40 or 50 pages of the Oregon Reports, and yet it is not unnecessarily long. It would be of no general interest, and the law in regard to the reformation of insurance policies is so well settled that there is practically no dispute between counsel in regard to it. We are fully satisfied that it was the contract and intent of the parties that, in consideration of the insurance covered by the July 30th policy being given by the plaintiff to the defendant company, a rider in the form set forth in plaintiff's complaint should be attached to it, and that a like rider should be substituted on the February policy and that by mistake this was omitted.

3. That the plaintiff was somewhat careless in not examining the policies issued more carefully is, perhaps, true; but this negligence should not prevent relief. There are few, if any, cases where the aid of equity is asked to reform mistakes in written instruments in which there is not disclosed some degree of negligence by the injured party, and this is particularly true as to insurance policies. The average per-

son insured describes his property to the agent, pays his premium, receives his insurance policy, and goes on his way rejoicing, usually not reading it, and not understanding half of it if he does read it. It is in evidence here that plaintiff's president did not understand the difference between a blanket policy and one containing the average clause until rival insurance agents enlightened him, and that this information was the cause of his determination to have all his policies blanketed. It is to the credit of insurance companies that as a rule they usually keep their promises and give the insured the kind of policy they agree to give him, and this fact has led the insuring public to accept policies issued by reliable companies without thorough examination. To hold that plaintiff cannot recover because its officers did what nearly everybody else does, namely, accepted the policies sent them without an industrious, technical examination of their contents, would be unjust.

Believing that the findings of the court below are fully sustained by the testimony, the decree will be affirmed. AFFIRMED. MODIFIED ON REHEARING.

MR. CHIEF JUSTICE MOORE, MR. JUSTICE BURNETT and MR. JUSTICE BENSON concur.

Modified September 12, 1916.

ON PETITION FOR REHEARING.

(159 Pac. 969.)

Messrs. Veazie, McCourt & Veazie, for the petition.

Mr. James G. Wilson, contra.

Department 1. MR. JUSTICE McBRIDE delivered the opinion of the court.

The petition for rehearing challenges the right of the Circuit Court to allow interest on the amount recovered, from the tenth day of December, 1914, to the fifteenth day of April, 1915, the date of the decree entered in that court. Upon the authority of *Richardson v. Investment Co.*, 66 Or. 353 (133 Pac. 773), and *Sargent v. American Bank & Trust Co.*, 80 Or. 16 (156 Pac. 431), such allowance was erroneous, and the decree will be modified so as to eliminate that item. In all other respects we adhere to the views expressed in our former opinion. MODIFIED ON REHEARING.

MR. CHIEF JUSTICE MOORE, MR. JUSTICE BURNETT and MR. JUSTICE BENSON concur.

Argued July 12, affirmed September 12, 1916.

CLARK v. CLARK.

(159 Pac. 969.)

Pleading—Verification—Striking Out.

1. It is proper to strike a pleading from the files when it is not properly verified.

Appeal and Error—Discretion of Trial Court—Amendment—Verification.

2. The action of a trial court in permitting or refusing an amendment of verification is discretionary, and not reviewable on appeal.

Dismissal and Nonsuit—Grounds—Unverified Pleading.

3. Where a complaint has been properly stricken from the files for want of a verification without leave to amend, the plaintiff has no standing in court, and the dismissal of the suit follows as a matter of course, irrespective of the reasons therefor given by the presiding judge.

From Multnomah: HENRY E. MCGINN, Judge.

Department 1. Statement by MR. JUSTICE BENSON.

This is a suit by Marcella Clark against A. E. Clark, The following facts appear by the record:

Plaintiff filed her complaint herein on January 7, 1915, and on January 12th, defendant filed a motion to strike it from the files for want of verification. On January 25th an order was made by Judge GANTENBEIN, of Department No. 6, directing that the cause be reassigned, and thereafter it was assigned to Department No. 3, in which Judge MCGINN presided. The motion to strike was heard in the latter department, and a decree entered on February 20th striking the complaint from the files and dismissing the suit. Plaintiff perfected her appeal from such decree in March, and on July 7th obtained from Judge GANTENBEIN, of Department No. 6, an order allowing her to amend her complaint by verifying the same and directing that the order be entered *nunc pro tunc* as of January 14th, and thereafter, on July 12th, the same judge made and entered an order vacating and canceling the order and entry of July 7th.

AFFIRMED.

For appellant there was a brief with oral arguments by *Mr. Thomas McCusker* and *Mr. Seneca Fouts*.

For respondent there was a brief with oral arguments by *Mr. John F. Logan* and *Mr. Bardi G. Skulason*.

MR. JUSTICE BENSON delivered the opinion of the court.

1, 2. There are several assignments of error, but it is necessary to consider but one: Did the court err in striking the complaint from the files and dismissing the suit? It does not require a citation of authorities to show that it is proper to strike a pleading from the files which is not properly verified. It is settled in this state that the action of a trial court in permitting or refusing an amendment of verification is discretionary, and not reviewable here: *Blanchard v. Bennett*, 1 Or. 328. In the case at bar there is no record of any application for leave to amend, and no order permitting amendment until long after the decree was entered, and then by a judge before whom the matter was not pending. Even that order was afterward vacated during the term at which it was made, and cannot now be considered as affecting the case.

3. Her primary pleading having been properly stricken from the files without leave to amend, the plaintiff had no standing in court. Litigation cannot proceed if there is no complaint. Hence dismissal of the suit followed as a matter of course irrespective of the reasons given by the presiding judge for his decision. Under these circumstances there was no error in the decree, and it is therefore affirmed.

AFFIRMED.

MR. CHIEF JUSTICE MOORE, MR. JUSTICE BEAN and MR. JUSTICE MCBRIDE concur.

Argued July 19, affirmed September 12, 1916.

GUNNELL v. VAN EMON ELEVATOR CO.*

(159 Pac. 971.)

Master and Servant—Master's Duty—Employers' Liability Act.

1. Under Employers' Liability Act (Laws 1911, p. 16), Section 1, an elevator company, employing a constructor's helper to do repair work upon the premises of a realty company and having charge of such work and control of the situation, was bound to use every device, care and caution which it was practicable to use for the protection and safety of life and limb.

Negligence—Condition of Premises—Elevator.

2. The owner of a building in which an elevator was operated was bound to take reasonable care and precaution against injuries to a constructor's helper in the employ of an elevator company engaged in repairing such elevator.

[As to liability of master to servant injured by elevator, see note in 56 Am. St. Rep. 806.]

Master and Servant—Action for Injury—Question for Jury—Control of Place of Work.

3. In an action by plaintiff, employed by an elevator company as a constructor's helper, for injury while on the premises of a realty company engaged in the repair of an elevator, evidence that the elevator company assumed control of the elevator in the adjoining shaft by which plaintiff was injured *held* sufficient to take the case to the jury on the issue of failing to provide a safe place in which to work.

Appeal and Error—Right to Complain—Instructions.

4. Plaintiff having joined the employer and the owner of the premises upon which he was injured while engaged in repair work, and alleged negligence on the part of each concurring in the resulting injury, neither defendant could complain of an instruction more favorable to its codefendant than to itself.

Negligence—Master's Liability—Contributory Negligence.

5. Under Employers' Liability Act, Section 6, the contributory negligence of the person injured is not a defense, but may be taken into account in fixing the amount of the damages.

Trial—Instructions—Evidence.

6. In an action by a constructor's helper in the employ of an elevator company for injury while engaged in repair work on the premises of a realty company by reason of the employer's failure to provide a safe place in which to work, an instruction that, if there was a safe way to do the work and plaintiff voluntarily chose an unsafe way,

*As to the constitutionality, application and effect of the federal Employers' Liability Act, see comprehensive notes in 47 L. R. A. (N. S.) 38; L. R. A. 1915C, 47. REPORTER.

his negligence would defeat recovery was properly refused, where there was no evidence that there were two ways of doing the work, one dangerous and the other safe.

From Multnomah: WILLIAM N. GATENS, Judge.

Department 2. Statement by MR. JUSTICE BURNETT.

The plaintiff, R. C. Gunnell, brings this action against two corporate defendants. The Van Emon Elevator Company is a California corporation authorized to transact business in this state, and the Broadway Realty Company is a domestic institution. The complaint avers that the latter concern at the time mentioned therein was in possession and control of eight office floors, the machinery-room, the two elevators in the lobby, and the elevator lobby on the first floor of what was known as the Broadway Building in Portland, and employed men to operate the elevators for the use and accommodation of its tenants in the building. When the injuries complained of happened the plaintiff was an employee of the elevator company as a constructor's helper. His employment is admitted by his employer. He states that at 6:30 o'clock P. M. on August 28, 1913, he was ordered by the elevator company to report with a fellow-employee at the Broadway Building for the purpose of making some repairs upon one of the elevators, and to that end his employer instructed him and his fellow-servant, and the realty company permitted, allowed and directed the two to use the elevator running in the south hatchway. In the progress of the work the plaintiff seated himself upon a concrete beam adjacent to the north elevator, for the purpose of countersinking some bolts in the guide-rails which controlled the counterweights of the elevator, as instructed by his employer and permitted and directed by the realty company. While this was going on the operator of the north elevator,

an employee of the realty company, whom the plaintiff alleges was under the direction, control and instruction of the elevator company and the realty company, carelessly and recklessly started the north elevator, but without warning, and, heedless of the warning cries given him by plaintiff, continued to operate the elevator upward at a high rate of speed, so that it struck the plaintiff on the left hip as he sat upon the beam on the fifth floor, and threw his body, and particularly his left foot, so that it came in contact with the counterweight, causing the injury of which complaint is made. The charge or negligence is in these terms:

“At the time and place at which plaintiff was injured, the defendants were negligent in permitting the elevator, which was operated by electricity, to be operated when the same was not ‘provided with a system of communication by means of signals so that at all times there might be prompt and efficient communication between the employees and operator of the motive power,’ as by law provided, and that it would have been practical to install such a system by furnishing electric bells, or by having the elevator stop while ascending at the fourth floor, and by having said elevator stop at the sixth floor, to ascertain whether the hatchway was clear at the fifth floor, and by having said elevator stop at the sixth floor when descending from the top to ascertain whether the hatchway was clear at the fifth floor, all of which could have been done without impairing the efficiency of the work as by law provided; in failing to give plaintiff warning that the elevator in the north hatchway was to proceed upward at the time in question, and not stopping to ascertain whether the hatchway was clear at the fifth floor; in failing to furnish plaintiff with a safe place in which to work; in failing to give plaintiff warning as to the dangers to be encountered in working in and about the place where plaintiff was injured; in failing to provide and have on the job an experienced and

competent foreman in charge of the work at the time of the accident; and in failing to use every device, care and precaution which it was practical to use for the safety of life and limb of the plaintiff, in that the elevator in the north hatchway could have been shut down while work was being carried on in the elevator in the south hatchway, and that such precaution would not have impaired the efficiency of the elevator as by law required; that as a result of said failures, the weight which counterbalances the elevator in the north hatchway came in contact with plaintiff at the fifth floor, crushing plaintiff's said foot and causing the elevator operator to become excited and reverse the elevator, making it descend, with the result that the counterweight of said elevator was further moved and plaintiff's said foot further injured."

The answer of the elevator company traverses all the allegations imputing liability to it. It stated, in substance, that it had no control whatever over the north elevator; that the same was operated at the time by an employee of the other defendant, all of which was well known to the plaintiff; that the latter carelessly and unnecessarily allowed his foot to hang over the well in which the counterweight of the north elevator was hung, fully knowing that if he did so the weight would crush his foot and injure it; and that with such knowledge he fully appreciated and understood the risks of taking such a position, and thereby assumed all the danger of injury. A second defense is couched in much the same language, and imputes to plaintiff negligence contributing to his own injury. All this new matter was traversed by the reply. The other defendant made a separate answer, which it is not necessary to consider, for the reason that at the trial the jury brought a verdict in favor of the plaintiff and against the Van Emon Elevator Company without mentioning the other defendant in any way.

Upon this verdict a judgment was rendered in favor of the plaintiff and against the elevator company, and the latter appeals. AFFIRMED.

For appellant there was a brief over the name of *Messrs. Sheppard & Brock*, with an oral argument by *Mr. C. A. Sheppard*.

For plaintiff-respondent there was a brief and an oral argument by *Mr. E. L. McDougal*.

For defendant-respondent there was a brief submitted over the name of *Messrs. Giltner & Sewall*.

MR. JUSTICE BURNETT delivered the opinion of the court.

1-4. One of the contentions of the defendant appealing is that the court erred in instructing the jury that the degree of care due from it to its employee was measured by what is known as the Employers' Liability Act, while the same instruction imputed to the other defendant only the common-law measure of care, the deduction being that, inasmuch as the plaintiff had charged the defendants jointly, it must follow that they should be treated alike by the court as to the measure of diligence in protecting the plaintiff from harm while engaged in the work in question.

It is admitted in the pleadings between the parties before us that the plaintiff was an employee of the elevator company at the time of the accident. Its liability must be measured by the relation thus existing between it and the plaintiff. The same general principle would apply to the other defendant. Each of them must be judged by the duty it owed to the plaintiff. But the record shows that the connection between the plaintiff and each of the defendants was dif-

ferent. In the one case there was the condition of master and servant, and in the other that intimate connection did not exist. The Broadway Realty Company was bound only to take reasonable care and precaution against injuring the plaintiff. As to the appealing defendant, the employer of the plaintiff, the rule is prescribed in the Employers' Liability Act, the concluding clause of the first section of which is in this language:

“And generally, all owners, contractors or subcontractors and other persons having charge of, or responsible for, any work involving a risk or danger to the employees or the public, shall use every device, care and precaution which it is practicable to use for the protection and safety of life and limb, limited only by the necessity for preserving the efficiency of the structure, machine or other apparatus or device, and without regard to the additional cost of suitable material or safety appliance and devices.”

There are many authorities cited by the appellant to the effect that where a master sends a servant in his general employment to work upon the premises of a third party, the employer is not responsible for an injury happening on account of the dangerous condition of the place over which the employer has no control, but that the liability, if any, must be visited upon the owner of the realty. All of those cases are instances where no such statute as our employers' liability law existed. This legislation has superseded that rule, and has explicitly visited upon a person who has charge of a work involving a risk or danger the duty of taking every precaution against the happening of an injury. There is ample testimony in the case to show that the Van Emon Elevator Company had control of the situation. It is admitted that it had charge of the work of repairs. It knew the surroundings, and

it was incumbent on it, when it sent its employee into the elevator shaft, to take precautions for his safety and provide for him a safe place in which to work. If it could not do so, it should have declined the undertaking. There was testimony, however, tending to show that it did assume control of the elevator, at least on the south side. This is sufficient to take the case to the jury independent of the authorities cited by the defendant. The negligence imputed to the Van Emon Elevator Company was of a negative sort, in failing to provide a safe place in which to work, and the like. The violation of duty attributed to the other defendant was of an affirmative nature, in that its careless act of operation of the machine produced the injury. In other words, approaching the scene from a different standpoint, the several shortcomings of each defendant concurred with the result that the plaintiff was hurt. Each defendant was bound by his own duty. Neither can complain of a direction given to the jury more favorable to its codefendant than to itself. The instruction correctly defines the duty of the elevator company, and it must be bound by it, irrespective of a charge more favorable to the other defendant.

5. Complaint is made of the refusal of the court to instruct the jury, at the request of the elevator company, to the effect that if there was a safe way for doing the work and an unsafe way, choice between which was within the power of the plaintiff, and he voluntarily chose the unsafe way, he would be guilty of contributory negligence utterly defeating his recovery. An answer to that is that the employers' liability law (Section 6), expressly says:

“The contributory negligence of the person injured shall not be a defense, but may be taken into account by the jury in fixing the amount of the damages.”

6. Moreover, the testimony fails to disclose a situation of the kind intimated by the requested instruction. It does not show that there were two ways of doing the work, one dangerous and the other safe. The only testimony on that point is that of the plaintiff himself, to the effect that the position he assumed was the only one from which could be accomplished the particular part of the work in which he was engaged when the accident happened. On both grounds, therefore, the court was justified in refusing the instruction. There is no error in the record, and the judgment is affirmed. AFFIRMED.

MR. CHIEF JUSTICE MOORE, MR. JUSTICE BEAN and MR. JUSTICE HARRIS concur.

MR. JUSTICE EAKIN absent.

Argued September 13, demurrer sustained September 19, 1916.

COOVERT v. OLCOTT.*

(159 Pac. 974.)

**Elections—Nominations—Method—Powers of Precinct Committeemen
—“Political Party.”**

1. Section 3333, L. O. L., provides that any political party may, by certificate of nomination, nominate candidates. Section 3359 defines a political party to be an affiliation of electors which at the next general election preceding polled for congressman at least 25 per cent of the entire vote. Section 3343 provides for withdrawal of nominees. Section 3344 provides procedure in case of withdrawal or death. Section 3345 provides that the party nominating a candidate who has withdrawn may fill the vacancy. Section 3367 makes the provision of Sections 3343 and 3344 applicable in case of direct primary nominations only in case of death or removal from the district before election, but in no other case. Section 3389 empowers precinct committeemen to make nominations to fill vacancies among candidates caused by death or removal from the district, but not otherwise. The incumbent

*As to power of precinct committeemen to fill vacancies occurring after primaries are held, see note in 41 L. R. A. (N. S.) 1090.

of office of state senator for the term ending in 1919 resigned in 1916 after the direct primary nominating election. Thereafter on notice a joint convention of precinct committeemen was held, and petitioner was nominated for the vacancy. *Held*, that, as no nomination was made at the direct primary nominating election, and as the vacancy did not occur through death or removal from the district, no nomination could be made to fill the vacancy.

Original proceeding in Supreme Court.

In Banc. Statement by MR. JUSTICE HARRIS.

In 1914 George M. McBride was elected to the office of state senator from the Fourteenth Senatorial District, comprising Clackamas, Columbia and Multnomah Counties, for the term ending January, 1919. On August 3, 1916, he resigned. The direct primary nominating election having already been held on May 19, 1916, a joint convention of the Republican precinct committeemen from the three counties was held on August 29th, pursuant to notice, for the purpose of nominating a Republican candidate for the office made vacant by the resignation so that such candidate could be voted for at the ensuing biennial election which will occur on November 7, 1916. The convention was organized by the election of a presiding officer and a secretary with an attendance of 473 precinct committeemen out of a total of 477 elected from the senatorial district. E. E. Coover received the votes of 456 of the precinct committeemen, "including the state central committeemen from each of said three counties, each being a central committeeman from his respective county"; and the convention declared that he was the Republican candidate for the unexpired term of the office made vacant by the resignation of George M. McBride. The presiding officer and the secretary of the convention prepared and verified a certificate setting forth the doings of the convention; and on September 1, 1916, the certificate was filed with the Secre-

tary of State, who now refuses to list and certify the name of E. E. Coover as a Republican nominee.

This court granted an alternative writ of *mandamus* directing the Secretary of State to list and certify the name of E. E. Coover as a candidate or to show cause for not so doing. The defendant shows cause by demurring to the writ. DEMURRER SUSTAINED.

Mr. George M. Brown, Attorney General, for the demurrer.

Mr. Charles A. Johns, contra.

MR. JUSTICE HARRIS delivered the opinion of the court.

1. The Republican party is a political party within the meaning of the direct primary nominating elections law, which was adopted by the people in 1904, and is codified in Sections 3349 to 3391, L. O. L., and amendments, and therefore by the express terms of Section 3359, L. O. L., amended by chapter 108, Laws of 1913, it "shall nominate all its candidates for public office, under the provisions of this law and not in any other manner, and it shall not be allowed to nominate any candidate in the manner provided by Section 3333." Section 3333, L. O. L., was enacted in 1891, and speaks of nominations by "any political party," by assemblies, and by individual electors. Every political party which is subject to the direct primary nominating elections law must nominate all its candidates "under the provisions of this law, and not in any other manner," because the direct primary nominating elections law furnishes the exclusive modes of nomination: *Healey v. Wipf*, 22 S. D. 343 (117 N. W. 521). Section 3359 continues by declaring that "the names of

candidates for public office nominated under the provisions of this law shall be printed on the official ballots for the ensuing election as the only candidates of the respective parties for such public office." Being subject to the direct primary nominating elections law, the Republican party cannot nominate its candidates in the manner provided by Section 3333 or by an assembly or by individual electors; but its nominations must be made by the persons and in the manner specified by the law. The only persons who are empowered to select candidates for the Republican party are: (1) The members of the party; and (2) their representatives. A party candidate is selected by the direct vote of the members of such party at an election held for that purpose or is chosen by the representatives of the party.

It was impossible for the members of the Republican party to nominate a candidate for the office of senator for the Fourteenth Senatorial District when the direct primary nominating election was held on May 19, 1916, for the reason that George M. McBride had not then resigned and his term of office extended until January, 1919. The members of the Republican party cannot now by their votes nominate a candidate for the office because another direct primary nominating election will not be held until 1918, which will be after the next biennial election for public officers. A Republican candidate could not be nominated on May 19th, and cannot now be nominated by the direct vote of the members of the party, and consequently the question for decision is whether the precinct committeemen, acting as the party representatives, had authority to nominate the petitioner as the candidate of the Republican party.

Provision is made in Section 3389, L. O. L., for the election of party committeemen. Every political party subject to the direct primary nominating elections law elects a committeeman for each election precinct, and the committeeman thus elected "shall be the representative of his political party," and all the committeemen of a county constitute the county central committee of such party. The county central committee elects the county members of the state central committee and of the congressional committee, and the state and congressional committees "shall have the same power to fill all vacancies * * that the county committee has to fill county vacancies. Said county and city central committees shall have the power to make nominations to fill vacancies occurring among the candidates of their respective parties nominated for city or county offices by the primary nominating election, where such vacancy is caused by death or removal from the electoral district, but not otherwise."

Assuming, but not deciding, that the committeemen from the three counties comprising the Fourteenth Senatorial District have power to fill vacancies, then the measure of that power is determined by the authority conferred upon the county central committee to fill county vacancies. Section 3389 provides for only one class of vacancies. Aside from vacancies among committeemen, the only kind of vacancies spoken of are those "occurring among the candidates * * nominated * * by the primary nominating election." The statute affords a method for filling a vacancy among candidates who have been nominated by the members of the party, and no provision whatever is made for filling a vacancy of any other kind by committeemen. The party committeemen can nominate

a candidate to fill a vacancy caused by the death or removal from the electoral district of another person who has previously been nominated by the members of the party; but the representatives of the party are powerless to nominate a candidate for an office unless the members of the party have themselves first nominated a candidate for that office. Moreover, the authority of the committeemen is further restricted to vacancies "caused by the death or removal from the electoral district," and consequently the committeemen cannot select a substitute for a person who has been chosen as a party candidate at a nominating election unless the first nominee dies or removes from the electoral district. The language of the statute is plain and unambiguous; but, apparently for the purpose of making assurance doubly sure, the framers of the enactment emphasized the limitations placed upon the power of precinct committeemen to fill vacancies by declaring that the power could be exercised as restricted by the statute which confers the power, "but not otherwise." Analogous, although not parallel, situations have arisen in other jurisdictions, and the conclusions reached there are in harmony with what is said here: *State v. Hayward*, 141 Iowa, 196 (119 N. W. 620); *Corser v. Scott*, 87 Minn. 313 (91 N. W. 1101); *Stewart v. Polley*, 30 S. D. 54 (137 N. W. 565).

Corroboration of the construction placed on Section 3389 is found in other sections of the statute. The direct primary nominating elections law was adopted by the people in the exercise of the initiative at an election held in 1904: Chapter 1, Laws 1905. Sections 3343 to 3345, inclusive, L. O. L., were enacted in 1891. Section 3343 permits "any person who has been nominated and accepted some nomination" to withdraw his name from nomination by pursuing a prescribed

method. Section 3344 states that, if any person nominated dies or withdraws before the day fixed by law for the election of public officers, then the name of such candidate shall not be placed upon the ballot. Section 3345 declares that, "if the original nomination thus vacated was made by a political party," and the party can reconvene, it may fill the vacancy, or a committee may fill the vacancy if the party has delegated the power to such committee. The provisions of Sections 3343 and 3344 are made applicable to nominations under the direct primary law by Section 3367, L. O. L., "in case of the death of the candidate or his removal from the * * electoral district," before the date of the ensuing election, but in no other case; and in case of such vacancy by death or removal the committee may fill the vacancy. It will be noted that Sections 3343, 3344 and 3345 speak of the death or withdrawal of any person who has been nominated, and Section 3367 applies to the death or removal from the electoral district "of the candidate," and "in no other case."

The direct primary nominating elections law provides for the election of precinct committeemen, and then specifies the powers which they can exercise, and consequently no power can be exercised by them unless it is granted by statute. The law defines in plain and unambiguous language the extent of the power of precinct committeemen to make nominations for their party, and then in language equally plain and unambiguous commands that the power to nominate candidates shall not exceed the defined authority. The statute must be taken as it is written, regardless of the results; and if there is need for enlarging the powers of precinct committeemen the right to enlarge

the authority of party representatives is exercisable by the legislative and not by the judicial department.

The demurrer to the writ is sustained.

DEMURRER SUSTAINED.

MR. JUSTICE EAKIN absent.

Argued July 20, reversed September 19, 1916.

NEILSON v. TITLE GUARANTY & SURETY CO.

(159 Pac. 1151.)

Appeal and Error—Record—Review.

1. On an appeal presented upon a record embracing only the pleadings and the findings of the trial court, the only question involved is whether the judgment appealed from is supported by the facts ascertained by the court and the admissions found in the pleadings.

Principal and Surety—Liability of Surety Company—Construction.

2. The rule of *strictissimi juris*, usually available to sureties without compensation, is generally relaxed when applied to a paid surety, so that a bonding company must show that its rights have been injuriously affected before it can defeat its contract.

[As to liability of surety company as distinguished from that of individual surety, see note in Ann. Cas. 1912B, 1037.]

Principal and Surety—Clearing Contract—Discharge of Surety—Unauthorized Payments to Principal.

3. Under a contract to clear and plow a tract at a certain price per acre, aggregating a certain amount for the entire work, and stipulating that on or before the fifth day of each month the owner or his agent should pay to the contractor the amount then due for work completed upon an estimate made by the owner or his agent, secured by a surety bond, providing that on default of the principal the surety might complete the contract, and should be subrogated to the rights and properties of the principal, including deferred payments and credits due the principal at default, or to become due thereafter, the owner's payment of nearly one half of the contract price on demands of the contractor, and without any information on which to make a real estimate, made before the contract was abandoned and when no part of the work was entirely completed and when not an eighth part of it was done, was such a payment as to relieve the surety.

From Multnomah: GEORGE N. DAVIS, Judge.

Department 2. Statement by MR. JUSTICE HARRIS.

The plaintiff, William Neilson, owned 12 lots in a tract of land known as "Buena Vista Orchards" in Wasco County, Oregon. On July 20, 1911, C. Masters contracted to clear and plow all the lots, and was to receive \$5,700, "or \$71.25 per acre," for certain designated lots, and \$400 for the work to be done on the remaining lots, aggregating \$6,100 for the entire work which the parties agreed "shall be completed not later than February 1, 1912." It was also stipulated that:

"On or before the fifth day of each month the said William Neilson, or his duly appointed agent, shall pay to the contractor the amount then due for work completed; the estimate shall be made by said William Neilson or his duly appointed agent."

In order to indemnify Neilson for any loss which he might sustain on account of any breach of the contract by Masters, the latter as principal, and the Title Guaranty & Surety Company, a corporation engaged in the bonding business, as surety, gave to Neilson a bond in the penal sum of \$6,100. It is provided in the bond that in case of default on the part of the principal, the surety shall have the right to complete the contract and "shall be subrogated and entitled to all the rights and properties of the principal arising out of the said contract and otherwise, including all securities and indemnities therefor received by the obligee, and all deferred payments, retained percentages and credits, due to the principal at the time of such default, or to become due thereafter by the terms and dates of the contract."

Alleging that Masters violated the contract in various particulars, and that "during the month of February, and after the term had lapsed within which

said contract was to be performed, said defendant C. Masters further breached and broke said contract by abandoning'' the work, leaving certain of the lots only partially cleared, the plaintiff commenced this action on the bond against the principal and surety.

Masters did not appear, but the surety answered and alleged that it had been discharged from any liability because Neilson had paid Masters sums of money at various times without making any estimate, and without regard to the amount of work completed, and that approximately one half of the contract price had been paid, although no part of the work was ever completed. The parties consenting, the cause was tried by the court without a jury. After hearing the evidence the trial judge made findings of fact, upon which Neilson was awarded a judgment against the surety for \$6,100, and the latter appealed.

REVERSED.

For appellant there was a brief over the names of *Messrs. Latourette & Latourette* and *Messrs. Emmons & Emmons*, with an oral argument by *Mr. J. R. Latourette*.

For respondent there was a brief over the names of *Mr. Hugh Montgomery*, *Mr. Robert J. Upton* and *Messrs. Platt & Platt*, with an oral argument by *Mr. Montgomery*.

MR. JUSTICE HARRIS delivered the opinion of the court.

In addition to what has already been stated a recital must be made of some of the facts found by the trial court, for the reason that the surety contends that it is entitled to a judgment on those facts. Neilson paid \$100 to Masters on September 5, 1911, \$400

on October 3d, and \$500 on November 1st, upon estimates of the work completed as provided in the contract. On November 18, 1911, however, Neilson departed for Boston and New York City, where he remained continuously until the following March, and while there he sent \$500 to Masters on December 5th, \$200 on December 11th and \$1,200 on January 2d. In the language of the trial court all the "payments made during Neilson's absence were based upon estimates made by Neilson himself, and that said estimates so made by him were based solely upon his knowledge of the conditions of the work obtained before his departure for the east, together with information contained in the above letters from King and Masters, which said letters contained all and the only information Neilson received of the work completed during his said absence," and the surety "did not consent to any payment other than as the contract provided."

The letters referred to in the quoted finding embrace several communications from Masters and one letter from King, who "was Neilson's sole agent about said work." Under date of November 23, 1911, Masters wrote to Neilson for \$700, saying that the necessary expenses will "keep me going some to make that cover it," and upon receipt of this letter Neilson sent a payment of \$500 to Masters. On December 5th, Masters wired to Neilson that he needed \$200 more to meet bills coming due, and Neilson then sent \$200. On December 24th, Masters wrote to Neilson, giving a statement of his expenses for the month of December, and also stated that he would need \$1,700, and on January 2, 1912, upon receipt of this letter, Neilson sent two drafts to King, one for \$1,200 and the other for \$500, with instructions to deliver the \$1,200 draft to Masters, "and if the work is half done," to deliver

the \$500 draft. The letter with which the drafts were inclosed concluded with a direction to King to "send me at once a detailed statement of the present condition of the clearing and your own estimate of the time necessary to complete it." King "determined that one half of the work had not been completed," and returned the \$500 draft to Neilson. The single letter received from King was dated December 4, 1911, and did not contain any information which would enable Neilson to estimate the work completed. Masters breached the contract in various particulars, and finally abandoned the work, and "not one-eighth part of the work was ever done by him."

1-3. The appeal is presented upon a record which embraces only the pleadings and findings made by the trial court, and consequently the only question involved is whether the judgment appealed from is supported by the facts ascertained by the Circuit Court and the admissions found in the pleadings: *Miller v. Head Camp*, 45 Or. 192 (77 Pac. 83); *Humphry v. Portland*, 79 Or. 430 (154 Pac. 897). The surety argues that it is discharged from liability because Neilson made payments to Masters without making estimates and without regard to the work completed. It will be recalled that Neilson agreed to pay to Masters on or before the fifth day of each month "the amount then due for work completed," and it was further stipulated that "the estimate shall be made by said William Neilson or his duly appointed agent." The September, October and November payments, aggregating \$1,000, were based upon estimates which were duly made by Neilson. On November 18th, Neilson went to New York and Boston, and while there made the remaining payments, aggregating \$1,900. He had no personal knowledge of the conditions exist-

ing after November 18th, and was without information concerning the progress of the work, except as revealed by the communications from Masters. The telegram and letters from the contractor were urgent appeals for money to meet expenses rather than statements of work done or estimates of work completed, and the remittances made by Neilson were based upon the indebtedness incurred by Masters rather than upon the work completed by him. The letter written by Neilson on January 2d, plainly shows that he was without knowledge of the conditions then existing, and could not make an estimate of the work completed; and yet, in spite of his lack of information concerning the work completed, he instructed King to deliver to Masters the \$1,200 draft, with the result that when Masters abandoned the contract in the following February, Neilson had paid to him nearly one half of the entire contract price, notwithstanding "no part of the work was ever entirely completed," and "not one-eighth part of the work was ever done."

The rule of *strictissimi juris*, which is usually available to those who become sureties without compensation, is generally relaxed when applied to a paid surety, and in this, as well as in most jurisdictions, a hired bonding company must show that its rights have been injuriously affected before it can defeat its contract of suretyship: *Bross v. McNicholas*, 66 Or. 42, 48 (133 Pac. 782, Ann. Cas. 1915B, 1272); *Atlantic Trust & Deposit Co. v. Town of Laurinburg*, 163 Fed. 690 (90 C. C. A. 274). The contract between Neilson and Masters contemplated an approximate judgment of the work completed, and the agreement was not observed when the owner made payments based on the expenses incurred by the contractor and without regard to the work completed: *Fidelity & Deposit Co. v. Agnew*, 152 Fed. 955 (82 C. C. A. 103); *O'Neill v. Title*

Guaranty & Trust Co., 191 Fed. 570 (113 C. C. A. 211); *Board of Commrs. v. Branham* (C. C.), 57 Fed. 179. Payment of substantially one half of the entire contract price, when less than one eighth of the work had been done, is such an excessive overpayment "that it may be accepted as self-evident that the alteration by the plaintiff proved prejudicial to the surety": *Justice v. Empire State Surety Co.*, 218 Fed. 802, 804 (134 C. C. A. 490, 492). The contract undertaken by Masters was either a losing or a profitable venture, but in either event the excessive overpayment reduced the amount to be paid for work yet to be done, and to the extent of such excess impaired the security which was available to the surety when Masters abandoned the contract. By his own conduct Neilson not only weakened one of the incentives for Masters to complete his contract, but he also materially lessened the security to which the bonding company was entitled, and therefore by his own conduct the plaintiff has injuriously affected the rights of the bonding company, so that the latter is now released from liability: *Calvert v. London Dock Co.*, 2 Keen, 638; *Prairie State Bank v. United States*, 164 U. S. 227 (41 L. Ed. 412, 17 Sup. Ct. Rep. 142); *Black Masonry etc. Co. v. National Surety Co.*, 61 Wash. 471 (112 Pac. 517); *Justice v. Empire State Surety Co.* (D. C.), 209 Fed. 105; *Id.*, 218 Fed. 802 (134 C. C. A. 490); *O'Neill v. Title Guaranty & Trust Co.*, 191 Fed. 570 (13 C. C. A. 211); *Fidelity & Deposit Co. v. Agnew*, 152 Fed. 955 (82 C. C. A. 103); *Wells v. National Surety Co.*, 222 Fed. 8 (137 C. C. A. 546). The judgment appealed from is reversed, and the surety is granted a judgment for its costs and disbursements. REVERSED.

MR. CHIEF JUSTICE MOORE, MR. JUSTICE BEAN and MR. JUSTICE BENSON concur.

Argued July 21, affirmed September 19, 1916.

CHASE v. McKENZIE.*

(159 Pac. 1025.)

Husband and Wife—Property—Estate by Entirety.

1. An estate by the entirety is recognized in Oregon.

[As to when husband and wife hold estates by entireties, see note in 26 Am. Rep. 65.]

Divorce—Estate by Entirety—Effect of Divorce.

2. A divorce changes an estate by entirety to an estate in common.

Mortgages—Cancellation—Intervening Liens—Restoration.

3. Where the holder of a realty mortgage cancels it in ignorance of the existence of an intermediate lien upon the premises, though such lien is of record, a court of equity in a suit instituted therefor will, in the absence of intervening rights, restore the original lien and give it priority; but, where a bid upon the execution sale of the lot had been credited on account of the judgment, such credit was an intervening right which could not be set aside so as to restore the original lien.

From Multnomah: CALVIN U. GANTENBEIN, Judge.

Department 2. Statement by MR. CHIEF JUSTICE MOORE.

This is a suit to reinstate a mortgage and to foreclose the lien thereof. The facts are these: The defendant John H. McKenzie on April 10, 1909, executed to H. Trenkman a mortgage upon lot 11, block 13, in Central Albina, Portland, Oregon, to secure the payment of his promissory note for \$1,500, maturing in two years, with interest at 7 per cent per annum, which note stipulated for the payment of a reasonable sum as attorneys' fees if suit were commenced to collect any part of the negotiable instrument. McKenzie and his wife on December 9, 1910, conveyed this lot, subject to the mortgage, to S. J. Fore and Minnie A. Fore,

*Upon the question of effect of divorce on community property, see notes in 30 L. R. A. 333; 10 L. R. A. (N. S.) 463; L. R. A. 1915C, 396.
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his wife. The latter alone on January 15, 1912, executed to William G. Hale a quitclaim deed of all her interest in the real property. At the same time Mrs. Fore commenced a suit for divorce, alleging in the complaint that her husband was the owner of an undivided half of the lot, but not stating who owned the remainder of the estate therein. She on March 4, 1912, obtained a decree dissolving her marriage contract, but no disposition appears to have been made of what estate she ever had in the premises. Trenkman on March 19, 1912, assigned the mortgage to plaintiff, Russell Chase, who on the 13th of the following month instituted a suit to foreclose the lien. Hale and his wife on May 17, 1912, executed to McKenzie a quitclaim deed of their interest in the lot. The defendant R. E. Bryan, on May 21, 1912, by consideration of the Circuit Court of the State of Oregon for Multnomah County, secured a judgment against S. J. Fore and others for \$5,576.30, and interest, attorneys' fees, costs and disbursements of the action. S. J. Fore on July 17, 1912, executed to McKenzie a special warranty deed of all his interest in the real property. McKenzie and his wife on September 18, 1912, executed to Sarah Champion a mortgage of the lot to secure the payment of a note for \$1,500, maturing in three years, with 8 per cent interest, payable semi-annually. The plaintiff on the next day dismissed the foreclosure suit, and two days thereafter satisfied the mortgage of record. Pursuant to an execution issued on Bryan's judgment all the right, title and interest that S. J. Fore had in the premises on May 21, 1912, when the judgment was given, and any estate which he might have subsequently acquired in the lot, were sold January 12, 1914, to Bryan for \$300. The sale was duly

confirmed and the sheriff executed to the purchaser a deed of the land.

The complaint herein sets forth most of these facts in substance, and alleges that the deed executed by Hale and his wife and the conveyance by S. J. Fore to McKenzie were made to the latter as agent and trustee for Chase pursuant to an agreement entered into between them to that effect; that when the suit was dismissed, and for a long time thereafter, Chase and McKenzie believed the deeds so executed by Hale and his wife and S. J. Fore conveyed to them a complete title to the real property, thereby avoiding the necessity for a decree of foreclosure, and while relying upon that opinion they satisfied the mortgage of record without any knowledge of the existence of Bryan's judgment, and that the suit would not have been dismissed or the mortgage canceled if they had known such judgment had been rendered; that they had no knowledge of the execution sale, the confirmation thereof, or the giving of the sheriff's deed until long after that conveyance was made. It is further alleged on information and belief that Bryan had knowledge of the understanding between Chase, McKenzie and Fore, whereby the foreclosure suit was dismissed and the mortgage satisfied when the Fore deed was executed.

The answer denies the material averments of the complaint, and for a further defense alleges, in effect, that the plaintiff ought to be estopped to allege and prove that the mortgage should be reinstated for that the judgment so secured by Bryan was based upon a promissory note which he received from Fore and others as assignors and guarantors, each of whom is insolvent except Fore and two others, naming them, and the only property Fore had was his interest in the

lot which was sold upon execution; that the summons in that action had not been served upon the other solvent defendants when judgment was rendered against Fore; that these two, having been subsequently served with process, answered, setting up the sale of Fore's real property for \$300; that Bryan had no notice or knowledge that Chase had or claimed any interest in the premises when they were sold upon execution; that when he obtained his judgment against the two solvent defendants he gave them credit for the \$300, the amount bid at the execution sale; that Chase from September 21, 1912, until the commencement of this suit allowed McKenzie to appear upon the record as the owner of the lot, to lease it and collect the rents due thereon, to execute a mortgage upon the same, and in every way to hold himself out to the world as the owner of the premises, subject only to the lien of such judgment; and that Bryan paid to the sheriff as his costs and expenses upon the execution sale \$10.75.

The reply put in issue the allegations of new matter in the answer, and the cause, having been tried, resulted in a decree reinstating the mortgage, foreclosing such lien, and allowing an attorney fee of \$150, subordinate, however, to the sum of \$300 which was credited on Bryan's judgment, and \$10.75 costs and expenses of the sale. From that decree Chase and Bryan separately appeal.

AFFIRMED.

For appellant there was a brief with an oral argument by *Mr. Milton Reed Klepper*.

For respondent there was a brief with oral arguments by *Mr. Samuel B. Huston* and *Mr. Oliver B. Huston*.

Opinion by MR. CHIEF JUSTICE MOORE.

1, 2. It will be remembered that the judgment secured by Bryan against Fore became a lien upon whatever interest the latter had in the real property May 21, 1912; that the original suit to foreclose the mortgage was dismissed September 19, 1912, and the lien canceled two days thereafter, thus rendering Bryan's judgment a superior lien upon Fore's interest in the lot. It will also be kept in mind that Mrs. Fore's quitclaim deed was executed before she secured a divorce, and that in such decree no disposition was made of any estate she then or ever had in the premises. It is unnecessary to advert to the estate by the entirety which was created by the conveyance of the lot to S. J. Fore and Minnie A. Fore, his wife, the validity of the quitclaim deed which she executed to Hale before she was divorced, or the effect of the decree dissolving her marriage contract. An estate by the entirety is recognized by this court: *Noblitt v. Beebe*, 23 Or. 4 (35 Pac. 248); *Oliver v. Wright*, 47 Or. 322 (83 Pac. 870). It has also been held that a divorce changed an estate by entirety to an estate in common: *Hayes v. Horton*, 46 Or. 597 (81 Pac. 386). It is unnecessary to inquire whether or not Mrs. Fore could, without joining with her husband, convey any interest in the land which she held as a tenant by the entirety. Upon this subject see the case of *Howell v. Folsom*, 38 Or. 184 (63 Pac. 116, 84 Am. St. Rep. 785). Nor is it essential to determine, if she took as a tenant in common when the divorce was granted, whether such title inured by estoppel to Hale under her quitclaim deed. As to the latter question in ordinary cases, however, see *Taggart v. Risley*, 4 Or. 235; *Bayley v. McCoy*, 8 Or. 259; *Salem Improvement Co.*

v. *McCourt*, 26 Or. 93 (41 Pac. 1105); *Langley v. Kessler*, 57 Or. 291 (110 Pac. 401, 111 Pac. 246).

3. Considering the principal question presented by this appeal, the rule is settled in Oregon that, when the holder of a realty mortgage cancels it in ignorance of the existence of an intermediate lien upon the premises, though the charge thus imposed upon the land is of record, a court of equity in a suit instituted for that purpose, will, in the absence of intervening rights, restore the original lien and give it priority: *Pearce v. Buell*, 22 Or. 29 (29 Pac. 78); *Kern v. Hotelling*, 27 Or. 205 (40 Pac. 168, 50 Am. St. Rep. 710); *Capital Lumbering Co. v. Ryan*, 34 Or. 73 (54 Pac. 1093); *Title G. & T. Co. v. Wrenn*, 35 Or. 62 (56 Pac. 271, 76 Am. St. Rep. 454).

In the case at bar intervening rights had accrued before the suit to reinstate the mortgage was commenced. Thus Bryan's bid of \$300 upon the execution sale of the lot having been credited on account of his judgment, the two solvent defendants in his action, who are not parties to this suit, could not be affected by any decree that might be rendered herein, and hence that credit cannot be set aside so as to restore the canceled mortgage to its original lien as to them. Their intervening rights have attached and should be protected.

The evidence shows that before he executed the mortgage to Sarah Campion, McKenzie secured an abstract of the title to the lot, which abridgment set forth a memorandum of Bryan's judgment. McKenzie was extremely careless in failing to note the judgment lien upon the land when the foreclosure suit was dismissed. From the cancellation of the mortgage it is reasonably to be inferred that McKenzie and Chase were ignorant of the intervening lien.

By compelling a payment to Bryan of the amount of his bid and interest, and the sheriff's costs, the sums awarded him as a prior lien upon a foreclosure of the original mortgage, substantial equity has been meted out, and, such being the case, the decree is affirmed.

AFFIRMED.

MR. JUSTICE BEAN, MR. JUSTICE HARRIS and MR. JUSTICE BENSON concur.

Submitted on briefs September 12, affirmed September 19, 1916.

BREWSTER v. CROOK COUNTY.

(159 Pac. 1031.)

Waters and Watercourses—Services of Water-master—Compensation.

1. Complaint in action against county, alleging that plaintiff was the duly elected, qualified and acting water-master, and that he rendered services under and by virtue of the order, authority and direction of the superintendent of the division, is sufficient under section 6621, L. O. L., stating when water-masters shall begin work, to show that the work was done on direction of the superintendent.

Pleading—Matter Provable Under General Denial.

2. Defendant county having denied approval of water-master's claims for services, a further answer that the claims were conditionally approved, but wrongfully filed contrary to the conditions, is demurrable; such matter being admissible under general denial.

Waters and Watercourses—Services of Water-master—"Emergency."

3. Complaint in action against county on claim for services as water-master showing that the master was busy at one point, and it was immediately necessary to supervise headgates at a distant point, and that on another occasion, the master broke his arm and was forced to have an assistant, sufficiently shows an "emergency" within the meaning of Section 6620, L. O. L., to entitle him to claim for services of assistants then appointed.

Waters and Watercourses—Water-master—Compensation.

4. Section 6619, L. O. L., providing that on approval by the division superintendent the county court shall allow and pay the water-master's claim for services, makes it mandatory for the county court to pay a claim so approved.

Trial—Instructions.

5. Error cannot be predicated upon refusal of an instruction substantially covered by others given.

Waters and Watercourses—Water-master—Compensation—Claim.

6. When the water-master performs his work under direction of the division superintendent, he need not attach a copy of the order to his bill for services, under section 6621, L. O. L., whose requirement that the order be attached applies only when the work is done at the request of water users.

[As to what are and what are not official acts of officers generally, see note in 6 Am. St. Rep. 130.]

From Crook: T. E. J. DUFFY, Judge.

In Banc. Statement by MR. JUSTICE BEAN.

This is an action by George H. Brewster against Crook County to recover a balance of \$155 for services as water-master in Crook County, and \$177 for the work of assistants for 46 days, claims for which were assigned to plaintiff, Brewster. The cause was tried to the court and jury, and a verdict rendered in favor of plaintiff. From a judgment thereon the county appeals.

Submitted on briefs under the proviso of Supreme Court Rule 18: 56 Or. 622 (117 Pac. xi).

AFFIRMED.

For appellant there was a brief submitted over the names of *Mr. Willard H. Wirtz*, District Attorney, and *Mr. M. R. Elliott*.

For respondent there was a brief over the name of *Mr. Jay H. Upton*.

MR. JUSTICE BEAN delivered the opinion of the court.

This matter was before us in the case of *Brewster v. Springer*, 80 Or. 68 (156 Pac. 434), and the law applicable thereto was plainly enunciated therein in an opinion by Mr. Justice EAKIN. In the present case the jury has passed upon the facts so that little re-

mains to be said except to consider the assignments of error upon the trial.

1, 2. The overruling of the demurrer to the complaint is assigned as error by the defendant. That pleading shows, in effect, that plaintiff is the duly appointed, qualified and acting water-master; that, "under and by virtue of the order, authority and direction of the superintendent of water division No. 2 of the State of Oregon," he rendered services as such water-master in said county for 120 days between March 1 and June 30, 1915, and was entitled to receive therefor \$5 per day, the amount of compensation theretofore fixed by the County Court of that county; that on different dates plaintiff presented to that tribunal two separate claims for such services, with a true copy of a statement of the time spent by him in such duties, verified by his oath, and that each of said claims was approved by the superintendent of water division No. 2 of the State of Oregon; that the County Court allowed and paid \$445 of the amount, leaving a balance of \$155 unpaid. It is urged that the complaint is insufficient, in that it does not show that plaintiff was called upon by the superintendent of water division No. 2 to perform the work, it being claimed by defendant that the complaint merely shows that the water-master was, as a matter of law, under the authority of the superintendent. There is no merit in the contention. A reading of the above-quoted part of the complaint clearly shows that the services were performed at the call of the superintendent: Section 6621, L. O. L. The allegation as to the authority of the superintendent for the work was not denied, but, nevertheless, was abundantly proven by the evidence. Defendant denied that either of said claims was approved by the division superintendent, and in a further

and separate answer averred, in effect, that the latter indorsed the claims of plaintiff with his approval, with the understanding that if not satisfactory to the County Court, they should not be filed with it, and that plaintiff wrongfully filed the same. A demurrer by plaintiff to the further and separate answer was sustained, and defendant predicates error upon such ruling.

It seems too plain for argument that the allegations of the further and separate answer did not add anything to nor change the denial of defendant that the superintendent approved the claims. If there had been any error or want of approval of the claims by the division superintendent, the defendant could have shown the same under the general denial, and the demurrer was properly sustained. It would have been a simple matter for defendant to have had the division superintendent inform the court and jury by his deposition if there had been a condition or anything lacking in his full approval of the claims. Plaintiff's proof that they were duly approved was not controverted.

3. As to the assigned claims for the services of assistants, it is urged by defendant that the complaint is deficient, in that the allegations that an emergency existed in the office of the water-master, necessitating the appointment of assistants, are mere conclusions of law. In the second cause of action the averment as to the need of such assistance is as follows:

“That on or about the fifteenth day of March, 1915, and while plaintiff was engaged in the active performance of his duties as water-master aforesaid in the vicinity of and east of Prineville, in Crook County, it became and was immediately necessary to supervise the headgates on Squaw Creek, in Crook County, Oregon, and by reason of said condition and necessity an

emergency existed in the office of said water-master, and under authority and by virtue of the laws of the State of Oregon, the plaintiff, as such water-master, appointed one Walt Graham as an assistant water-master of the State of Oregon for Crook County, and said Walt Graham thereupon duly qualified as such acting assistant water-master, and rendered services as such assistant water-master within said Crook County for a period of seven days, at an agreed compensation of \$3 per day."

In the third cause of action such necessity is shown as follows:

"That on or about the twenty-second day of May, 1915, the plaintiff, as water-master aforesaid, was suffering from a broken arm, and was unable to visit and attend to the ditches in the western part of Crook County and to also attend to and look after the duties in the main office of the water-master at Prineville, in Crook County, and supervise the work of said office, and by reason thereof an emergency existed in the office of said water-master, and plaintiff, as such water-master, under the authority vested in him as such water-master, appointed one Roy Rannalls as such assistant water-master at an agreed compensation of \$4 per day, and said Roy Rannalls thereupon qualified as such assistant water-master, as required by law, and thereupon and thereafter rendered and performed services as assistant water-master in and for Crook County, Oregon, for a period of 39 days."

In both instances the facts set forth in the complaint constitute an emergency within the meaning of Section 6620, L. O. L., necessitating the assistance. The compensation claimed was approved by the division superintendent. The demurrer to the complaint was properly overruled.

4. Counsel for defendant timely submitted a motion for a nonsuit, and also moved for a directed verdict, and predicates error upon the refusal to grant the

same. The evidence, which we have carefully examined, tended to show that the services for which the amounts are claimed were duly authorized as provided by the statute, and performed; that a just and true itemized statement of account of the time spent by the water-master in the service for the county was kept by that official, and a copy thereof, duly verified, was presented to the county court with the approval of the superintendent, according to the provisions of Section 6619, L. O. L. In its wisdom the legislature saw fit to clothe the superintendent of the water division with authority to appoint a water-master and direct him in the rendition of his services. The statute makes it mandatory for the County Court of the county in which the work of a water-master has been performed and a claim therefor has been properly presented to allow and pay the same: *Brewster v. Springer*, 80 Or. 68 (156 Pac. 433). The testimony supports the allegations of the complaint, and is amply sufficient to be submitted to the jury, and there was no error of the trial court in overruling either the motion for a nonsuit or that for a directed verdict.

5. The court's refusal to instruct the jury to the following effect is also assigned as error:

"If you find from a preponderance of the testimony in this case that the plaintiff kept a just and true account of the time spent by him in the duties of the office of water-master in Crook County, and that he has presented a true copy thereof, verified by his oath, to the County Court, sitting for the transaction of county business, and that same was approved by the water superintendent of water division No. 2, then you will find that to be conclusive upon the County Court, and they must pay the same, provided also that said work was performed upon the call of the water superintendent of division No. 2."

This requested instruction was given in substance by the trial court in its charge to the jury. The trial court judge thoroughly explained the issues of the case to the jury, and plainly submitted to the latter the following questions: (1) Did the plaintiff perform his work upon the order of the superintendent? (2) Did he present a claim to the county verified by oath? And (3) did the claim have the approval of the superintendent? The jury found these three things in favor of the plaintiff. The charge given embodied, in substance, all the requested instruction, and properly submitted the questions of fact for the determination of the jury.

6. Error is also predicated upon the instruction of the court to the jury that when the water-master performs his work under the direction of the division superintendent, he is not required to attach a copy of the order of his superior officer to his bill for services. This authority for the rendition of such services is only to be shown in writing, and attached to account for the same when they are rendered upon the written request of one or more water users; Section 6621, L. O. L. This section provides as follows:

“When arrangements are not made for employment of a water-master at a monthly rate, as provided in section 6619, the said water-master shall begin his work upon written demand being made upon him therefor by one or more water users. Such written demand for his services shall be attached to his bill for services and forwarded with it to the county commissioners of the proper county. Where the said water-master is employed by the month he shall begin work and terminate his services as the superintendent of his water division may direct. The division superintendent may, under any condition, call upon the water master for work within his district whenever the neces-

sity therefor may in his judgment arise": *Wattles v. Baker County*, 59 Or. 255 (117 Pac. 417).

The instruction was in strict conformity with the statute, and was not erroneous. The interests of the county are carefully safeguarded in the statute, and it is our guide.

Finding no error in the record, the judgment of the lower court is affirmed. **AFFIRMED.**

Argued July 5, affirmed August 1, rehearing denied September 26, 1916.

MACKENZIE v. DOUGLAS COUNTY.

(159 Pac. 625; 159 Pac. 1033.)

Counties—Agents of State—Obligations.

1. Counties are governmental agencies of the state, and where the state by enactment, for governmental purposes, imposes a constitutional obligation on the county, the county must fairly meet it.

Counties—Audit of Books—Powers of Insurance Commissioner.

2. Laws of 1913, page 546, Section 12, providing that audit of books of a county for years before or after 1914, may be made by or under supervision of the state insurance commissioner upon proper assurance that the expense will be borne by the county, authorizes the audit for years prior to 1914 only if the county agrees to pay the expense thereof, and for years after 1914 only for special audits other than the annual, and Section 14, authorizing employment of experts not to exceed the amount appropriated therefor, does not authorize the insurance commissioner to make a contract with expert accountants for a county, independent of its authorities so as to render the county liable for the cost, except where made by the commissioner.

Statutes—Construction—"Proviso."

3. While a proviso is commonly found at the end of the act or section, and is usually introduced by the word "provided," that word is not necessary, the matter and not the form of the succeeding words controlling; a "proviso" necessarily containing a condition or limitation upon the preceding matter.

Statutes—Construction—General Words.

4. The general intent will be controlled by the particular intent subsequently expressed.

Officers—Grants of Power—Construction.

5. Acts conferring statutory powers on an officer are strictly construed.

Statutes—Construction—Punctuation.

6. Although punctuation may be resorted to as an aid in construction when it tends to throw light on the meaning, yet it may be disregarded when it would tend to convey a meaning not in consonance with the rest of the act.

Counties—Statutes—Construction—Punctuation.

7. Laws of 1913, page 546, Section 12, as to audit of books of any "city, county school district," etc., though there is no official comma between "county" and "school district," will be construed as if the comma were present, so as to apply to counties, as required by the later provisions of the act.

Officers—Compensation of Experts—Liability.

8. The right of an officer to demand expenses incurred by him in the performance of official duty must be found in the constitution or the statute conferring it, either directly or by necessary implication; and a private citizen cannot have any greater right in this respect.

[As to rules of construction of statutes, see note in 12 Am. St. Rep. 826.]

Counties—Audit of Books—Compensation of Experts—Liability.

9. A claim for compensation of experts who audited county books cannot be allowed under Laws of 1913, page 545, unless the complaint shows that the insurance commissioner made the audit, or that the county officials agreed to pay therefor.

From Douglas: JAMES W. HAMILTON, Judge.

Department 2. Statement by MR. JUSTICE BEAN.

This is an action by W. R. Mackenzie and C. A. Mackenzie, partners doing business under the firm name and style of W. R. Mackenzie & Son against Douglas County, Oregon, a municipal corporation, on a contract alleged to have been made on or about September 28, 1914, by plaintiffs and the state insurance commissioner on behalf of Douglas County under the provisions of Chapter 286, Laws of 1913, page 545, for the purpose of having a careful and accurate audit made of its books and accounts. Plaintiffs allege that the agreed compensation was to be \$10 a day with their expenses, and that 42½ days were occupied in making

the audit mentioned, their expenses amounting to \$153.50, thus aggregating \$578.50.

Defendant demurred to the complaint for insufficiency of facts stated therein. The Circuit Court sustained the demurrer, and dismissed the action. Plaintiffs appeal. AFFIRMED. REHEARING DENIED.

For appellant there was a brief over the names of *Mr. M. E. Crumpacker* and *Mr. James C. Fullerton*, with an oral argument by *Mr. Crumpacker*.

For respondent there was a brief over the names of *Mr. George Neuner, Jr.*, District Attorney, and *Mr. Dexter Rice*, with an oral argument by *Mr. Neuner*.

MR. JUSTICE BEAN delivered the opinion of the court.

1. It may be stated that counties are but agencies of the state for governmental purposes: *Grant County v. Lake County*, 17 Or. 453, 458 (21 Pac. 447); 2 Words and Phrases, p. 1653; 11 Cyc. 343. Where a state by enactment, in furtherance of its governmental purposes, imposes an obligation upon a county not in conflict with the Constitution of the state, that obligation becomes one which the county must fairly meet: *Grant County v. Lake County*, 17 Or. 453, 458 (21 Pac. 447); *Crossen v. Wasco County*, 10 Or. 111; *Wallowa County v. Oakes*, 46 Or. 33, 35 (78 Pac. 892).

Counsel for defendant claim: (1) That without the consent of the county the state insurance commissioner was not authorized by the act to make a contract for and incur liability on behalf of the county for the audit of its books; and (2) that plaintiffs' remedy, if any, is by writ of review to re-examine the decision of the county court in refusing to pay the claim.

2. The first question involves a construction of the act of 1913. In 1915 the legislature repealed the law: See Laws 1915, pp. 123, 328. The enactment provided that the state insurance commissioner should formulate and prescribe a uniform system of accounting for all offices and institutions using state money, and also for all counties of the state, and permitted such a system for road and school districts. The first nine sections thereof are devoted principally to provisions for the inauguration of such a system to be accomplished by January 1, 1914. That part of the statute particularly applicable to the question involved herein is as follows:

“From and after January 1, 1914, the state insurance commissioner shall at least once each year make a careful and accurate audit of the books and accounts of each institution or officer, expending state money, and of the books and accounts of each county of the state”: Section 10.

“The expense of each such audit shall be certified by the state insurance commissioner to the county of which such audit was made, and shall be paid by such county direct to the person making the audit”: Section 11.

“The expense of auditing the books and accounts of the institutions and officers expending state money shall be paid by the state from the funds appropriated by this act, upon the proper voucher of the state insurance commissioner. An audit of the books and accounts of any city, county school district, road district, port or other taxpaying district for any year or years before or after 1914, may be made by or under the supervision of the state insurance commissioner, upon proper assurance that the expense thereof will be paid by the county, city or other branch of government or the deposit of a sufficient sum therefor, by any individual”: Section 12.

Section 17 required a complete report showing the financial status of each county and state institution to be published by the insurance commissioner each year, beginning on or before the year 1915. The meaning of the act is not instantly apparent, and, in order to ascertain the legislative intent, it will be necessary to consider the whole plan or scheme of the law. Provision was made for the payment of an audit in three different ways, namely: (1) An audit by the state insurance commissioner of the state books and accounts to be paid for by the state; (2) an annual audit by that official after January 1, 1914, of the books and accounts of each county of the state to be paid for by such county upon the certificate of the state insurance commissioner, and (3) an audit of the books and accounts of any city, county, school district, or taxpaying district which may be made by, or under the supervision of the state insurance commissioner upon proper assurance that the expense thereof will be paid by the county. As to the second provision for such payment, Section 10 provided for an official examination by the above commissioner of the books and accounts of each county of the state after January 1, 1914. Section 11 directed that the expense of such an audit should be certified by the insurance commissioner to the proper county, and by it paid directly to the person making the audit, and not to the state or through its usual official channels. It should be kept in mind that these provisions relate to the experting of county books by the commissioner, which will furnish that official with the information necessary as a basis for the annual report required by Section 17.

After providing for the manner of payment of expenses relating to state accounts, in Section 12 we find a proviso that:

“An audit of the books and accounts of any city, county school district, road district, port or other tax-paying district for any year or years before or after 1914, may be made by or under the supervision of the state insurance commissioner, upon proper assurance that the expense thereof will be paid by the county, city or other branch of government. * * ”

This quoted part of the section contains all the authorization found in the law for the experting of county books “under the supervision of the insurance commissioner” as distinguished from being done by that official.

It appears that the lawmakers had in mind that in many of the counties of the state an audit of the affairs of the county had already been made up to about the date of the passage of the act, and, by the latter part of Section 12 it was intended to provide for the experting of county books by the insurance commissioner, or under his supervision, for years prior to 1914, dependent upon the assurance of the county authorities that the expense would be borne by that branch of the government. The provision for such an audit after 1914 is believed to apply to any city or taxpaying district other than a county, or to some special audit of county business, such as the expenditure of a large fund for some improvement, which its officials might desire to be experted without waiting for the annual audit. This view is strengthened when we remember that the law clearly contemplated that the system should be in vogue so that the financial affairs of the state and counties should be under the official eye of the insurance commissioner from and after January 1, 1914, and the experting of the books of other taxpaying districts left conditional under the latter part of Section 12. By Section 14 the commissioner was

authorized to employ such clerical and expert assistance on such terms as he might deem best, in the performance of the duties imposed upon him by the act, not to exceed in any year the total amount appropriated therefor. It is plain that this section does not relate to the employment of experts to be compensated by a county. Nowhere in the law do we find authority for the insurance commissioner to make a contract with expert accountants for a county, independent of its authorities, nor to so render the county liable for the cost of making such audit save when it is made by that official.

3. The official auditing of the accounts of a county by the state insurance commissioner and the making of a contract for the experting of such books by an independent accountant are two different things. The commissioner is empowered by Section 16 to subpoena and examine witnesses in order to ascertain the true status of any item of account which it is his duty to audit. For this purpose that official is clothed with the same authority as a circuit judge, plainly providing for an official audit of the books and accounts to be made by the commissioner. By this construction of the statute it seems that every section and clause is given a meaning in accordance with the legislative intent. To turn on the light of some of the rules of construction in our aid, as the mechanical arrangement of the latter sections and clauses of the statute are not methodical, we note as authority for the term "proviso" which we have applied to the latter part of Section 12 that:

"A proviso is a clause added to a statute, or to a section or part thereof, which introduces a condition or limitation upon the operation of the enactment, or makes special provision for cases excepted from the

general provisions of the law, or qualifies or restrains its generality, or excludes some possible ground of misinterpretation of its extent": Black, Interpretation of Laws, § 107.

4. A proviso is commonly found at the end of the act or section to which it applies, and it is usually introduced by the word "provided." This, however, is not necessary to determine its character. It is the matter of the succeeding words, and not the form, that determines its legal character: *Id.*, p. 270. Section 110 of the same work reads thus:

"The natural and appropriate office of a proviso to a statute, or to a section thereof, is to restrain or qualify the provisions immediately preceding it. Hence it is a rule of construction that it will be confined to that which directly precedes it, or to the section to which it is appended, unless it clearly appears that the legislature intended it to have a wider scope."

"The general intent will be controlled by the particular intent subsequently expressed": 2 Lewis' Sutherland, Stat. Const., § 351.

5. Acts which confer statutory power upon an officer are strictly construed: *Id.*, § 562.

If the portion of Section 12 to which we have referred had been introduced by the word "provided," while it would not have changed the legal effect thereof, we doubt if this litigation would have resulted.

6, 7. It is contended by counsel for the plaintiffs that, there being no official comma after the word "county," where it first appears in Section 12, as shown by the session laws and legislative journal, the words "county school district" there used refer to a school district of the county, and that the limitation does not apply to auditing the books of a county. The word "county," appearing the second time in the pro-

viso authorizing an audit "upon proper assurance that the expense thereof will be paid by the county," seems to refute such a contention. It is not usual for county authorities to assume the payment of such expenses for school districts or other taxpaying districts except for the county itself. The point is not well taken. The language of the act does not indicate the meaning as claimed. It is a well-known rule of statutory construction that, although punctuation may be resorted to as an aid in construction when it tends to throw light on the meaning, yet it may be disregarded when it would tend to convey a meaning to a section not in consonance with the other parts of the act: *Commonwealth v. Kelley*, 177 Mass. 221 (58 N. E. 691); *Stiles v. Guthrie*, 3 Okl. 26 (41 Pac. 383).

8. It is an inflexible rule that the right even of an officer to demand expenses incurred by him in the performance of official duty must be found in the Constitution of the statute conferring it, either directly or by necessary implication; and a private citizen could not have any greater right in this respect: *Jackson v. Siglin*, 10 Or. 93; *Pugh v. Good*, 19 Or. 85, 92 (23 Pac. 827); *Houser v. Umatilla County*, 30 Or. 486, 489 (49 Pac. 867); *Baker County v. Benson*, 40 Or. 207, 212 (66 Pac. 815).

9. The claim asserted in the complaint does not show that the audit of the county books and accounts was made by the state insurance commissioner, nor that the officials of the county of Douglas made assurance or agreed that the expenses thereof would be paid by the commissioner. The contract alleged in the complaint was not authorized by the statute. This conclusion renders unnecessary a discussion of the other question raised. The demurrer to the complaint was

therefore properly sustained by the trial court. The judgment is affirmed.

AFFIRMED. REHEARING DENIED.

MR. CHIEF JUSTICE MOORE, MR. JUSTICE BURNETT and MR. JUSTICE HARRIS concur.

MR. JUSTICE EAKIN absent.

Denied September 26, 1916.

ON PETITION FOR REHEARING.

(159 Pac. 1033.)

Mr. M. E. Crumpacker and Mr. James C. Fullerton,
for the petition.

Mr. George Neuner, Jr., District Attorney, and Mr. Dexter Rice, contra.

Department 2. **MR. JUSTICE BEAN** delivered the opinion of the court.

Passing by the mere disputations assertions which are of little assistance in the construction of a statute, we note that the petition for a rehearing in this case is based largely upon the theory that the court found that the state insurance commissioner was not authorized to audit the accounts of a county of the state for the year 1914 and collect pay therefor from such county. This is not the conclusion indicated by the former opinion. What we held was that the claim, as shown by the record, was not for the services of that official, but for those of an entirely different person; that the audit of the books of Douglas County was not made by a state official or contem-

plated by the law in question. Neither did the commissioner in any way stand as sponsor for such audit. We simply reassert the substance of our former opinion. We are not aware that we can find language to express the matter plainer than formerly. However perfectly the learned counsel for plaintiff may expound the statute in question, it is certain that for some reason he misconstrues the memorandum made by the court. All that we find added to the argument in the request for a rehearing is the opinion of the former able Attorney General. He advised the insurance commissioner as follows:

“I would consequently advise that under said Chapter 286, it is your duty to audit the accounts of each county annually, and it is the duty of the several counties to pay your deputy making such audit, and that the audits of the lesser governmental units of the county are permissive, but not compulsory.”

Suffice it to say in regard thereto that in so far as the case under consideration is concerned, the audit of the accounts for which compensation is claimed does not appear to have been made in accordance with such advice. The legislature will soon be in session, and if a state officer has been misled by an ambiguous statute, it is in its power to prevent any loss from being suffered.

After a careful examination of the petition herein, and also of that in the companion case of *Berridge v. Marion County*, ante, p. 391 (159 Pac. 628), we adhere to our former opinion.

AFFIRMED. REHEARING DENIED.

MR. CHIEF JUSTICE MOORE, MR. JUSTICE BURNETT and MR. JUSTICE HARRIS concur.

MR. JUSTICE EAKIN absent.

Motion to dismiss appeal allowed September 26, 1916.

VAN ZANDT v. PARSON.

(159 Pac. 1153.)

Appeal and Error—Notice of Appeal—"Adverse Party."

1. An "adverse party," with reference to the right to service of a notice of appeal, is a plaintiff or defendant in an action or suit whose interest in regard to the judgment or decree appealed from is in conflict with a reversal or modification of the final determination sought to be reviewed, and includes one whose discharge in bankruptcy would be thereby affected.

Judgment—Conclusiveness—State Court—Effect in Federal Court.

2. A judgment or decree of a state court in an action in which a trustee in bankruptcy is a party and appears and contests the bankrupt's property rights is conclusive upon the latter's estate, and estops his creditors from controverting such final determination even in the federal court which has secured jurisdiction of the bankruptcy proceeding.

Bankruptcy—Trustee—Action in State Court.

3. A trustee in bankruptcy may sue in the state court, and where he does so to recover fraudulently conveyed property or property otherwise recoverable, he is entitled to all remedies and all relief which would be afforded any other party litigant under the same facts.

From Multnomah: ROBERT G. MORROW, Judge.

In Banc. Statement by MR. CHIEF JUSTICE MOORE.

Harry Van Zandt commenced this suit to recover from A. M. H. Parson the remainder due upon the sale of an automobile and to foreclose a vendor's lien thereon. Ralph Wills, George Patterson, and Lee Armstrong were made codefendants; the complaint charging that they had or claimed some interest in or lien upon the car, which qualified right of property was inferior to plaintiff's lien. Parson, pursuant to a stipulation that \$334.60 was due on account of the purchase of the automobile, deposited that sum with the clerk of the court to abide the final determination as to who was entitled to the money, whereupon the plaintiff executed a formal transfer of the car to Parson

who took no further part in the suit. Thereafter the defendants Wills and Patterson moved for an order making the plaintiff's mother, Frances J. Van Zandt, and her trustee in bankruptcy, Robert E. Hitch, codefendants on the ground that they were necessary parties. The supplemental affidavit of Wills asserts facts tending to show that, though the contract for the sale of the automobile was made with the plaintiff, his mother at that time was the owner of the car, and her creditors were entitled to the sum of money so on deposit. The trustee in bankruptcy, pursuant to an order of the United States District Court for the District of Oregon, in which such proceedings were pending, and by sanction of the state court in which this suit was instituted, was made a party defendant, as was also Mrs. Van Zandt. The latter filed an answer admitting the averments of the complaint and alleging that at all times mentioned in the primary pleading the plaintiff was the owner of the automobile, and that she never had or claimed any interest therein or right to the proceeds of the sale thereof.

The suit was dismissed as to Armstrong. Wills, Patterson and Hitch filed an answer denying some of the averments of the complaint and alleging facts tending to show that Mrs. Van Zandt was the owner of the car when the contract for the sale thereof was made by the plaintiff, and that her creditors were entitled to the money remaining due on account of the sale of the car.

The prayer of the answer is to the effect that Mrs. Van Zandt be declared to be the owner of the automobile, and that the money left with the clerk be paid over to the trustee for distribution among her creditors. The reply denies the allegations of new matter in the answer. Based upon these issues, the cause was

tried, resulting in a decree for the plaintiff that he was entitled to the money so left with the clerk. From this decree Wills, Patterson and Hitch undertake to appeal, but did not give any notice in open court at the time the decree was rendered, or serve a notice of appeal upon the defendant Frances J. Van Zandt.

APPEAL DISMISSED.

Mr. W. B. Shively, for the motion.

Mr. Robert E. Hitch and *Mr. Barge E. Leonard*,
contra.

Opinion by MR. CHIEF JUSTICE MOORE.

1. The plaintiff's counsel move to dismiss the appeal on the ground that Mrs. Van Zandt is an adverse party, and, not having been served with a notice of appeal, this court has no jurisdiction of the cause. An adverse party is a plaintiff or defendant in an action or suit whose interest in regard to the judgment or decree appealed from is in conflict with a reversal or modification of the final determination sought to be reviewed: *Hamilton v. Blair*, 23 Or. 64 (31 Pac. 197); *The Victorian*, 24 Or. 121 (32 Pac. 1040, 41 Am. St. Rep. 838); *Moody v. Miller*, 24 Or. 179 (33 Pac. 402); *Osborn v. Logus*, 28 Or. 302 (37 Pac. 456, 38 Pac. 190, 42 Pac. 997); *Stuller v. Baker County*, 30 Or. 294 (47 Pac. 705); *Conrad v. Packing Co.*, 34 Or. 337 (49 Pac. 659, 52 Pac. 1134, 57 Pac. 1021); *Kramer v. Marsh*, 49 Or. 417 (90 Pac. 583); *Hafer v. Medford etc. R. Co.*, 60 Or. 354 (117 Pac. 1122, 119 Pac. 337); *State v. McDonald*, 63 Or. 467 (128 Pac. 835, Ann. Cas. 1915A, 201); *Barton v. Young*, 78 Or. 215 (152 Pac. 876); *D'Arcy v. Sanford*, ante, p. 323 (159 Pac. 567).

2; 3. A text-writer in discussing the rights of a trustee in bankruptcy says:

“He may sue in a state court”: Remington, Bankruptcy, § 1721.

This author in another section observes:

“Where the trustee resorts to the state court to recover fraudulently conveyed property or property otherwise recoverable, he is entitled to all remedies and all relief that would be afforded any other party litigant under the same facts”: Id., § 1760.

A judgment or decree given or rendered by a state court in an action or suit in which a trustee in bankruptcy is a party and who appears and contests the property rights of the bankrupt is conclusive upon the latter's estate and estops the creditors from controverting such final determination even in the federal court which has secured jurisdiction of the bankruptcy proceeding. Thus in the case of *In re Tiffany* (D. C.), 147 Fed. 314, decided August 15, 1906, it was held that the judgment of a state court, in a suit brought by a bankrupt's trustee, refusing to set aside a transfer of property made by the bankrupt as fraudulent, concludes creditors, who cannot thereafter set up the same ground to defeat the bankrupt's discharge. It was ruled in the case of *In re Seavey* (D. C.), 195 Fed. 825, that where a bankrupt's trustee instituted proceedings in a state court to set aside as fraudulent an assignment of an alleged interest in certain property under the will of her grandfather, and to establish his right thereto as trustee, and the bankrupt duly defended such action, in which the trustee was successful, the judgment, in the absence of an appeal therefrom, was conclusive, and could not be collaterally attacked or reviewed for error in the bankruptcy proceeding. So, too, a transfer, by a bankrupt, while insolvent, to his wife of property which he omits from his schedule constitutes a concealment of his assets and defeats his

right to a discharge: *In re Graves* (D. C.), 189 Fed. 847.

If this court has jurisdiction of the appeal, and upon a review of the evidence should conclude that Mrs. Van Zandt was the owner of the automobile when the contract of sale was made, and that her creditors were entitled to the money remaining due on the car, such determination would necessarily preclude her discharge in bankruptcy, thus showing she would be affected by a modification or reversal of the decree, and hence an adverse party. No notice of the appeal having been served upon her, this court did not secure jurisdiction of the cause.

The attempted appeal should therefore be dismissed, and it is so ordered. APPEAL DISMISSED.

Argued September 14, reversed September 26, 1916.

WOODS v. DUNN.

(159 Pac. 1158.)

Wills—Agreement to Devise—Validity.

1. It is competent for one to make a binding agreement to devise real property by his last will, as the property of a living person is his own and he has a right to contract or alienate the title either by will or testament.

Specific Performance—Agreement to Devise—Sufficiency of Evidence.

2. In a suit for specific performance of an agreement by defendant's deceased relative to devise to plaintiff certain realty in consideration of her promise to care for him and furnish him a home during the remainder of his life, evidence *held* to show the making of such agreement.

Frauds, Statute of—Memorandum—Agreement to Devise Realty.

3. An agreement to devise real property is not within Section 808, L. O. L., providing that an agreement for the leasing or sale of real property, or any interest therein, shall be void unless it, or some memorandum thereof, expressing the consideration, be in writing, subscribed by the party to be charged, or by his lawfully authorized agent.

Wills—Agreement to Convey—Statute.

4. Section 804, L. O. L., providing that no estate or interest in real property other than a lease, etc., can be created except by conveyance or other instrument in writing, subscribed by the party creating it, etc., and Section 805, qualifying it to provide that it shall not affect the power of a testator in the disposition of his realty by last will or the power of the court to compel the specific performance of an agreement in relation to such property, and Section 7319, providing that every will shall be in writing, signed by the testator, or by some other person under his direction in his presence, and attested to by two or more competent witnesses in the presence of the testator, were satisfied by a duly executed writing or will, giving to plaintiff 200 acres of described land on the understanding that she should furnish testator a home and care for life.

Specific Performance—Agreement to Devise—Consideration—Sufficiency of Evidence.

5. In a suit for specific performance of an agreement between the defendant's deceased relative and plaintiffs, whereby he covenanted to devise to plaintiff certain land in consideration of her promise to care for him and furnish him a home during his life, evidence held to show that plaintiff had fully performed all the conditions thereof.

Specific Performance—Agreement to Devise—Adequacy of Consideration.

6. Under such agreement, made when deceased was 64 years of age and having a life expectancy of 11 years, who was uncouth in person and habit, requiring special attention, food and ever-increasing care, and made after he had had the advice of an attorney and understood the nature of the agreement, and after he had become dissatisfied with living with his relatives, and when he had property amounting to over \$52,000, of which the part agreed to be devised was valued at about \$12,000, the consideration was not so inadequate as to make its performance unreasonable and unjust, where deceased lived only four or five months after the agreement was made.

[As to specific performance of contract to make a will, see note in Ann. Cas. 1914A, 399.]

From Benton: JAMES W. HAMILTON, Judge.

Department 1. Statement by MR. JUSTICE BURNETT.

This is a suit by Winona L. Woods and husband against J. Leroy Dunn and others to enforce specific performance of an agreement, alleged to have been made between Richard Dunn, deceased, and the plaintiffs, whereby he covenanted to devise to the plaintiff Winona L. Woods 200 acres of land in Benton County, Oregon, in consideration of their promise to care for

him and furnish him a home during the remainder of his life. He was 64 years of age, childless, and had been divorced from his former wife. The plaintiffs say that he was without a fixed home, and was living about from place to place without any settled habitation, although he was possessed of considerable property. His holdings in Benton County were appraised at \$52,454.02 after his death. The plaintiffs allege that in the early spring of 1913 they were residing in the vicinity of Corvallis upon a farm owned by them, and that in addition to the occupation of cultivating it the husband was engaged in teaching in the public schools. Further, that about that time Dunn came to their residence and proposed to them that if they would give up their home and remove to King's Valley, take possession of a certain 200 acres of his land, operate the same, and furnish him a home, nurse, cook for, board and take care of him in sickness or in health during the remainder of his life, he would convey, or transfer, the title of this land by such means as his attorney should advise, and do certain other things in the way of helping to improve the property not necessary to be here mentioned. They aver that he was advised by his attorney that the best means of accomplishing the contract on his part would be by a will, and subsequently during the month of May of that year he executed in due form of law his last will and testament, whereby he devised to the plaintiff Winona L. Woods the 200-acre tract of land in consideration of the promise of the plaintiffs already mentioned. They state that in pursuance of the contract thus formed they sold their home near Corvallis, the plaintiff husband abandoned his intended career of teaching, and they removed to the land in question, took possession of the same, improved it and in every

way complied with their agreement, furnished Richard Dunn with a home and cared for him attentively and completely in accordance with their covenant. Dunn died as the result of an accidental shooting on September 4, 1913. The complaint declares that later in the same month another instrument, purporting to be the last will and testament of Richard Dunn, was admitted to probate in the County Court of Benton County, and that it omitted the devise to the plaintiff Winona of the 200 acres of land in question. The defendants J. Leroy Dunn, Lizzie E. Dunn, James Dunn, Madge Dunn, Ida Pruett and Mary Pratt are heirs at law of Richard Dunn and devisees under this last-mentioned will, which bears date July 16, 1913. The plaintiffs allege that they have demanded a conveyance of the 200-acre tract which has been refused. The prayer of the complaint is to the effect that the defendants, as successors in interest of the decedent, convey the land in execution of the alleged agreement.

The contract upon which the complaint is based is denied by the defendants. The complaint is otherwise traversed in part. They rely upon the July will as a final disposition of the decedent's property. The first affirmative defense is:

“That the said alleged agreement set out in said complaint, if any such there were, was and is void because neither the said alleged agreement nor any note or memorandum thereof, expressing the consideration, was in writing and subscribed by the said Richard Dunn, or by his lawfully authorized agent, as required by Section 808, L. O. L.”

Next the defendants aver that the alleged contract was rescinded by the mutual agreement of the parties prior to Dunn's death. Of this we remark in passing there is no evidence whatever. Lastly, they declare thus:

“That at the time of said alleged agreement set out in the complaint, the lands described in the complaint were, ever since have been, and now are of the reasonable worth and value of \$12,000. That at the time of said alleged agreement the said Richard Dunn was aged and in an enfeebled condition of health, and seriously ill, and at said time the expectancy of life of the said Richard Dunn, because of his enfeebled condition and poor health and sickness was not to exceed one year. That said alleged agreement, if any such there were, was grossly unequal and harsh in its terms, and was grossly improvident on the part of said Richard Dunn, by reason of the disparity between the benefits to accrue to him from the services to be performed thereunder by the plaintiffs and their value and the value of said lands. That at the time of making of said alleged agreement, and for a long time prior thereto, the said Richard Dunn was and had been greatly enfeebled in mind and body by reason of his age and sickness and long-continued excessive indulgence in the use of intoxicating liquors, and to such an extent that he was easily susceptible to the influence of others; and that if said alleged agreement was made by the said Richard Dunn, the same was procured from him by the overreaching influence and persuasion of the plaintiffs, fraudulently exerted upon the mind of said Richard Dunn while in such weakened and enfeebled condition.”

The affirmative matter of the answer is traversed by the reply. As matter in estoppel the plaintiffs further set forth more in detail the age and partially helpless condition of the decedent; that, owing to his afflictions and lack of culture, he was not a pleasant companion; that the defendants, who are his relatives, were unwilling to have anything to do with him; that in default of their attentions Dunn turned to the plaintiffs to supply him with the comforts of a home, which they did, and which his relatives neglected. They enlarge to considerable length on the allegations of their

complaint respecting the services they rendered, and say that the defendants stood by without rendering any aid or service to Dunn, saw and without making objection permitted the plaintiffs to perform such offices and to go into possession of and remain on said land; that the plaintiffs have in every way performed their contract with Dunn; and that he received said performance to his great aid and comfort.

After a hearing the Circuit Court found substantially that the agreement was made as stated in the complaint; that Richard Dunn actually executed a will containing a devise to Mrs. Woods of the 200 acres mentioned, and that the plaintiffs performed their agreement for about five months, when Dunn was accidentally killed. The court, however, concluded that the services rendered might be estimated at full value liquidated in money so as to reasonably make the promisees whole, and that, in view of a gift of money previously made by Dunn to the plaintiff Winona, the services as a consideration are inadequate for the realty in dispute, and so dismissed the suit. The plaintiffs appeal. **REVERSED.**

For appellants there was a brief over the names of *Messrs. Weatherford & Weatherford* and *Messrs. McFadden & Clarke*, with an oral argument by *Mr. James K. Weatherford*.

For respondents there was a brief over the names of *Mr. John M. Pipes*, *Messrs. Yates & Woods* and *Messrs. Woodcock, Smith & Bryson*, with oral arguments by *Mr. Pipes* and *Mr. E. R. Bryson*.

MR. JUSTICE BURNETT delivered the opinion of the court.

The evidence shows, as stated, that Richard Dunn had accumulated property amounting to upward of

\$52,000, and that he was childless and alone in the world. He had little to do with his relatives, and the testimony discloses that they gave him little attention. He was uncouth in his habits, having lived on the frontier most of his life, and was addicted to the use of intoxicants. He had resided for a time with his nephew on lands afterward devised to the latter by the July will, but the cookery in the family did not suit him, and he was disturbed by the noise of the nephew's little son, so that his home there was not to his liking. He had known Mrs. Woods from her childhood, and was quite fond of her. He had often visited at the home of her parents, where she showed him such attention as a little girl would render to an old man who appeared to be attached to her. She and her husband were graduates of the Oregon Agricultural College. After their marriage they taught school, and finally purchased a small tract of land adjoining Corvallis, where, in addition to the operation of their little farm, the husband had secured a situation in the Corvallis schools. They intended to make that their permanent home and pursue the career of teaching near the seat of learning already mentioned. The testimony shows that at this juncture Dunn visited them, and proposed to the wife that if she and her husband would remove to the property in dispute, some 14 miles distant, and take care of him, furnish him a home, and minister to his necessities in sickness or in health as long as he lived, he would give her the land in such manner as his attorney should advise. She told him, in substance, that she preferred to consult her husband, that they had settled on their career, and that she would not give him an answer at the time. She and Dunn both told her husband about the matter, and they consulted with him, but the plaintiffs reserved

their decision for a later date. After considering the subject about two weeks, they decided to accept Dunn's offer. During this period he remained at their house a part of the time, drank considerable liquor, and for about a week was drunk practically all the time. His condition is described by Mrs. Woods to the effect that he sat in his chair and slept most of the time, going to his bottle when he woke and drinking more. During the week that this continued she and her husband took care of him and ministered to his wants generally. After he recovered from his debauch, without saying anything to either of the plaintiffs, he went to the bank and drew out \$1,000 in coin, taking Mr. Woods with him. For that purpose he had the plaintiff husband draw a check in favor of Dunn which the latter signed, as for some reason or other he was not well able to write more. Calling Woods to accompany him, they went to another bank, where Dunn delivered the coin to the cashier, with instructions to deposit it to the account of Mrs. Woods. The cashier asked how she spelled her given name, and Dunn called upon Woods to supply the information. This was the first that either of the plaintiffs had any intimation of his intention to make the gift of the money. Afterward Dunn had a slight stroke of paralysis, which interfered somewhat with his speech, but at his request, in order to wind up the business, Mrs. Woods sent for his attorney, who came and took his directions about the draft of his will, in pursuance of which that document was drawn up and executed by him the following day. After the instruction about the payment of his debts and the disposition of his body, he gave to a niece \$300, and any note or account he might hold against her at his death; to one nephew \$50, and to another, with whom he had resided, as stated, a life

estate in about 165 acres of land in Benton County, Oregon, remainder in fee to the son of the nephew. The sixth clause of that will reads thus:

“I give and bequeath to Winona L. Woods two hundred (200) acres to be taken from the north side of my lands situated in township 10 south, range 6 west of Willamette Meridian in Benton County, Oregon. I make this bequest with the distinct understanding that the said Winona L. Woods shall furnish me a home and take care of me either in sickness or in health during my natural life.”

He then devised to his four sisters all the rest of his land, finishing the disposition of his property by giving the *residuum* to all the legatees, to be divided between them equally. The July will was much like the former, except that it omitted all reference to the plaintiffs, or either of them.

1. It is settled in this state that it is competent for one to make a binding agreement to devise real property by his last will and testament: *Rose v. Oliver*, 32 Or. 447, 456 (52 Pac. 176); *Richardson v. Orth*, 40 Or. 252, 263 (66 Pac. 925, 69 Pac. 455); *Kelley v. Devin*, 65 Or. 211 (132 Pac. 535). The property of a living person is his own. He has an undoubted right to lawfully contract so as to alienate the title from himself, either by deed or testament. During his lifetime his relatives have no right or interest in the same as such. The law of descents is a conventional process, instituted to take the place of title by mere occupancy, and may be avoided by testamentary disposition. It was permissible, therefore, for Richard Dunn to contract with the plaintiffs as they allege. The question to be determined is whether he did so stipulate.

2. The record is replete with evidence that the agreement was made substantially as averred in the

complaint. Concerning his lack of acumen to make the same, even if we should conclude that the answer of the defendants sufficiently pleads that he was suffering from disability, the testimony is ample that he thoroughly understood what he was about, and was competent in every way to make such a contract. It is true that his ailment made talking somewhat difficult, but he was able to make himself understood to his attorney, and, after the will had been drawn it was read to him to his thorough understanding and he executed it in all respects as provided by our laws. Moreover, the matter had been thoroughly canvassed by the plaintiffs and the decedent prior to the attack of paralysis, and was fully understood by all of them.

3, 4. It is contended by the defendants that there is no writing satisfying the statute of frauds embodied in Section 808, L. O. L. The defendants rest their contention in that respect on the part of that section here set down:

“In the following cases the agreement is void unless the same or some note or memorandum thereof, expressing the consideration, be in writing and subscribed by the party to be charged, or by his lawfully authorized agent; evidence, therefore, of the agreement shall not be received other than the writing, or secondary evidence of its contents, in the cases prescribed by law. * * 6. An agreement for the leasing, for a longer period than one year, or for the sale of real property, or of any interest therein.”

Laying aside for the moment the idea that this was not an agreement for leasing or selling real property, but a contract to devise the same, we proceed to consider whether the clause of the will already quoted would be a sufficient memorandum within the statute. From the quoted devise we discern what is to be done by the owner of the realty. He is to give and be-

queath to Winona L. Woods a certain described 200 acres of land. What induced him to do so is also specified. It is that she shall furnish him a home and take care of him, either in sickness or in health, during his natural life. The thing which induced him to make the devise is the consideration. It is expressed in the memorandum, even considering this is a sale instead of what it is, a devise. The terms of the statute respecting some note or memorandum thereof expressing the consideration are fully met in the writing, and it was subscribed by the party to be charged. That is to say, the duty of devising the realty was charged upon Richard Dunn, and we find over his own signature in the record the will containing the quoted clause. In all statutory respects it is a note or memorandum of the covenant between the parties, expressing the consideration in writing, and subscribed by the party to be charged. In treating of indispensable evidence, Section 804, L. O. L., reads thus:

“No estate or interest in real property, other than a lease for a term not exceeding one year, nor any trust or power concerning such property, can be created, transferred, or declared otherwise than by operation of law, or by a conveyance or other instrument in writing, subscribed by the party creating, transferring, or declaring the same, or by his lawful agent, under written authority, and executed with such formalities as are required by law.”

This, however, is qualified by Section 805, as follows:

“The last section shall not be construed to affect the power of a testator in the disposition of his real property by a last will and testament, nor to prevent a trust from arising or being extinguished by implication or operation of law, nor to affect the power of a court to compel the specific performance of an agreement in relation to such property.”

It is true that Section 7319 says:

“Every will shall be in writing, signed by the testator, or by some other person under his direction, in his presence, and shall be attested by two or more competent witnesses, subscribing their names to the will, in the presence of the testator.”

Reading all these sections together, it is manifest that an agreement to devise real property is not within the purview of Section 808 as the defendants contend. The subject matter of this contract is governed by Sections 805 and 7319, both of which are satisfied by the writing introduced in evidence, to wit, the will of May, 1913.

5. Beyond all this, the evidence is full and complete, without substantial dispute that the plaintiffs fully performed all the conditions of their pact with the decedent. They gave up the career which in their early married life they had mapped out for themselves. They went upon the land at Dunn's request. Largely at their own expense they made valuable and substantial improvements thereupon. They devoted themselves almost exclusively to his comfort. They supplied the place which ought to have been, but was not, offered by his own relatives. It was natural that in default of proper attention from those of his own blood, he should turn to the little girl of whom he was so fond in her childhood, but now grown to adult estate and settled in a home of her own. The kindness to him which she had learned in infancy she continued in the present juncture, and there is no showing that she in the least abated the devotion that would have been due from a most dutiful daughter.

6. It is contended that because of the fact that Dunn accidentally met his death in about four months after the agreement was made it would be unreasonable and

unjust to require the covenant to be specifically performed. As to the justice of the matter, bearing in mind that it is not a question between the original parties, all of whom were free, voluntary agents empowered to act as they desired, we remark that he could not rely upon his relatives to give him suitable attention. He was dissatisfied with them, and naturally turned to other sources for the desired care. It is just that the benefit of his bounty should inure to those who did him the most good, and all that was done for him at all. Moreover, it is but a part of his wealth that goes in that direction. As stated, his property amounted to upward of \$52,000. Whatever claims his relatives might have upon him are amply compensated by the residuary clause of his will. It ill lies in their mouths to say that he was incompetent to enter into the agreement which they attack, or to make a will in performance of his covenant, for they claim under a devise made only about two months later. Besides this, at his age of 64, according to the American Mortality Tables he had an expectancy of more than 11 years. It is true that his physician said to him after the paralytic attack already mentioned that he might live a year or he might live 10 years, but that is mere opinion, and shows nothing to alter the case materially. The task imposed upon them by the agreement contemplated a probable continuance of 11 years, and possibly longer, taking care of an old man uncouth in person and habit and requiring special attention, special food and ever-increasing care. The character of the service was such that it could not be fairly calculated in advance according to a mere monetary standard. The property was his, and he had a right to compensate the plaintiffs for their ministrations in any manner he chose, provided he did it understand-

ingly and without any fraud or imposition upon him. The testimony shows that he had the advice of his own attorney, that he thoroughly understood the nature of the business in which he was engaged, and that he acted without any coercion or influence of anyone, and wholly on his own initiative. The transaction was as fair as it possibly could be made, and it was entered into upon mature deliberation. At that time none of his relatives had any right to or interest in any of his property. They did not do or pay anything giving them any claim upon it afterward. If nothing else appeared, they would only be beneficiaries of a conventional system for the orderly devolution of property in default of other disposition of it by the last holder. At best, they are recipients of his generosity under his will, but they take it subject to his contract affecting the property.

That the undertaking was accomplished in less than the contemplated time cannot alter the question. Neither can it affect the matter that before the agreement was made he gave \$1,000 to the plaintiff wife. That was unsolicited by anyone, and was a pure gratuity which he had the right to bestow. In that view the case must depend entirely upon whether plaintiffs performed their part of the contract. We hear of instances where a real estate broker earns a large fee in a day or two after he has taken the contract of finding a purchaser of the premises. Its payment is enforced. We continually pay premiums for the insurance of our houses, yet the buildings never burn. Shall we recover the money because no conflagration ensues? On the other hand, a fire often occurs the day after the premium was paid for insurance covering an extended period of years. Are we entitled to a rebate of the premium on that account? The uncertainty of

the time during which the plaintiffs would continue performance of the contract was naturally within the contemplation of the parties, and they must be presumed to have contracted with reference thereto.

In brief, the statutes governing such a transaction have been fully complied with. Even if the statute of frauds, upon which the defendants rely, affected the case, the record is replete with testimony of part performance, taking the matter out of the statute. The contract is established. Its performance on the part of the plaintiffs is thoroughly proven. Without their knowledge the decedent broke his covenant by making a new will, ignoring the plaintiffs, yet gave them no notice of rescission, but continued to avail himself of their hospitality, and eventually died in their home. The court cannot make a new contract. The stipulation was made. It must be observed. The following precedents are applicable to the instant case: *Berg v. Moreau*, 199 Mo. 416 (97 S. W. 901, 9 L. R. A. (N. S.) 157); *Bryson v. McShane*, 48 W. Va. 126 (35 S. E. 848, 49 L. R. A. 527); *Lothrop v. Marble*, 12 S. D. 511 (81 N. W. 885, 76 Am. St. Rep. 626).

Upon the fact found, the decree of the Circuit Court was an erroneous conclusion. It is reversed, and one here rendered according to the prayer of the complaint.

REVERSED. DECREE RENDERED.

MR. CHIEF JUSTICE MOORE, MR. JUSTICE BENSON and MR. JUSTICE HARRIS concur.

Argued September 13, affirmed September 26, 1916.

NELSON v. BROWN & McCABE.

(159 Pac. 1163.)

Master and Servant—Injuries to Servant—Contributory Negligence—Statute.

1. Under the Employers' Liability Act (Laws 1911, p. 18), Section 6, declaring that the contributory negligence shall not be a defense, but may be considered by the jury in fixing damages, in an action for injuries by the employee of a stevedore company, an instruction that, if the plaintiff was guilty of negligence contributing to injury, he could not recover, even though the defendant was also guilty of negligence, was properly refused.

Master and Servant—Injuries to Servant—Assumption of Risk—Statute.

2. In actions for personal injuries by employees coming within the scope of the Employers' Liability Act, the doctrine of assumption of risk by the employee is abrogated.

[As to assumption of risk under Federal Employers' Liability Act, see note in *Ann. Cas.* 1915B, 493.]

Master and Servant—Injuries to Servant—Safe Place to Work—Statute.

3. Under the Employers' Liability Act (Laws 1911, p. 18), Section 1, providing that persons having charge of work involving risk or danger must use every device or care practicable for the protection of life and limb, in an action for personal injuries by the employee of a stevedore company, an instruction that, if the defendant had provided a reasonably and ordinarily safe place for the plaintiff to work, considering the character of the work, defendant could not be found negligent in not providing a safe place for the plaintiff to work, was properly refused.

Appeal and Error—Harmless Error—Instructions.

4. In an action for personal injuries by the employee of a stevedore company, the instruction that a servant in entering employment assumes the ordinary risks incident to the work contracted to be done, or such as the master might have avoided by reasonable care, though erroneous, was not prejudicial to the master.

Master and Servant—Injuries to Servant—"Accident."

5. In relation to the law of master and servant, an "accident" is an incident that could not have been reasonably foreseen, anticipated, prevented or provided against, and for it the master is not liable.

Appeal and Error—Reversal for Colloquy of Counsel.

6. In a servant's action for injuries, where, during argument, one of plaintiff's attorneys stated that plaintiff had a wife and family to support, which should be taken into consideration in assessing

damages, whereupon defendant's attorney objected and took an exception to the remark, whereupon opposing counsel reiterated the statement, defendant's attorney again objecting and taking an exception, there was no reversible error, where the court was not called upon to rule upon the question or to instruct the jury to disregard the argument of plaintiff's counsel.

From Multnomah: WILLIAM GALLOWAY, Judge.

Department 2. Statement by MR. JUSTICE BURNETT.

This is an action by H. Nelson against Brown & McCabe.

The defendant is a corporation engaged as stevedores in Portland, Oregon. It is admitted that at the time of the grievance of which the plaintiff complains he was in its employ and received an injury while working for the defendant upon a certain Japanese steamship in the port of Portland. It appears that the defendant was engaged in loading the ship with flour which was sent aboard the vessel by means of chutes carrying it into the various hatchways for storage on the lower decks and in the hold. The particular hatchway at which the accident happened was an opening through the decks of the vessel about 12 feet wide and 18 feet long running lengthwise of the ship. Into the opening were fitted edge up and athwartship some steel beams called "strongbacks" about 14 inches in width by one half inch in thickness. Between the beams and at right angles to them were timbers called "fore and afts" resting in gains or pockets on the strongbacks. The timbers were about 6 inches square by about 6 feet long. In the progress of the work in which the plaintiff was engaged it became necessary to put one of these fore and afts in place. The plaintiff took hold of one end and a fellow-employee took up the other end. A plank was laid across where his comrade was required to go, but the plaintiff was compelled by order of the foreman in

charge of the work to sit astraddle of the strongback, and in this position to drag after him his end of the timber. It proved too long for the place, and they were directed to take it out. In doing so the plaintiff lost his balance and fell into the hold of the vessel, a distance of about 21 feet, breaking his arm near the wrist and receiving other injuries. The burden of his complaint is that his employer did not furnish a reasonably safe place in which he was required to work, and that he was called upon to perform his task in a manner involving a risk and danger to himself.

The answer denies all the allegations of the complaint except the corporate character of the defendant, the employment of the plaintiff, and the fact that he received an injury. It alleges as affirmative defenses that the hurt was the result of a pure accident which could not have been prevented by the exercise of any reasonable or proper care on the part of the defendant; that the plaintiff was guilty of negligence contributing to his own hurt; and, lastly, that he was a skilled workman, understanding the nature of his task and fully appreciating all the risks of the employment. These defenses are traversed by the reply. As a result of a jury trial there was a verdict and judgment in favor of the plaintiff, from which the defendant appeals.

AFFIRMED.

For appellant there was a brief over the names of *Mr. F. C. Howell* and *Messrs. Wilbur, Spencer & Beckett*, with an oral argument by *Mr. Howell*.

For respondent there was a brief over the name of *Messrs. Schmitt & Schmitt*, with an oral argument by *Mr. G. G. Schmitt*.

MR. JUSTICE BURNETT delivered the opinion of the court.

1. The errors relied upon before us are predicated upon instructions given by the court and the refusal of others requested by the defendant. One of the latter is this:

“Contributory negligence consists of such acts or omissions on the part of the plaintiff as would amount to want of ordinary care under the particular circumstances; and if the plaintiff in this case was guilty of negligence contributing to the accident and injury which he sustained, he cannot recover, even though the defendant was also guilty of negligence.”

Such an instruction to the jury would make contributory negligence a bar to the action, whereas Section 6 of what is known as the employers' liability law declares that:

“The contributory negligence of the person injured shall not be a defense, but may be taken into account by the jury in fixing the amount of the damage.”: Laws 1911, p. 18.

2. By another instruction refused, the defendant sought to impose upon the plaintiff the assumption of risk. Since the passage of the initiative act above mentioned we have frequently held that because this is a criminal statute visiting a penalty upon persons in charge of a work involving a risk or danger the doctrine of assumption of risk by the employee is abrogated in actions coming within the scope of the act for the reason that it will not be presumed that one party to the contract will be bound by the action or nonaction of the other involving a violation of public law by the latter. The authorities on this subject are collated in *Marks v. Columbia County Lumber Co.*, 77 Or. 22 (149 Pac. 1041).

3. The third request by the defendant was to direct the jury as follows:

“While it is the duty of an employer to provide his servants a place to work in that is reasonably safe, taking into consideration the character of the work being performed, yet the master is not obliged to use more than ordinary or reasonable care in providing a safe place, and if you find from preponderance of the evidence that the defendant herein had provided a reasonably and ordinarily safe place for the plaintiff to work, taking into consideration the character of the work being done, you are instructed that the defendant cannot be found negligent in not providing a safe place for the plaintiff to work.”

Before the passage of the employers' liability law this instruction might have been justified by precedents holding that an employer was not bound to use the latest or most improved appliances, but was only required to employ reasonably safe machinery and the like, but this does not measure up to the standard prescribed by the latter clause of Section 1 of the enactment referred to, the language of which is:

“And generally all owners, contractors or subcontractors and other persons having charge of, or responsible for, any work involving a risk or danger to the employees or the public, shall use every device, care and precaution which it is practicable to use for the protection and safety of life and limb, limited only by the necessity for preserving the efficiency of the structure, machine or other apparatus or device, and without regard to the additional cost of suitable material or safety appliance and devices.”

Measured by the statute, the action of the court in refusing this instruction was correct.

4. The defendant complains that the judge did wrong in saying to the jury:

“You are further instructed that a servant, in entering the employment of a master, assumes the ordinary risks incident to the work contracted to be done, but not such as the master might have avoided by reasonable care.”

The instruction was indeed erroneous, but the error was favorable to the defendant. It cannot complain.

5, 6. Further error is predicated of this charge given to the jury:

“An accident is an incident that could not have been reasonably foreseen, anticipated, prevented or provided against; so that in this case, if you find that it was purely an accident, the defendant is not liable. On the other hand, if you find that the injury to the plaintiff could have been reasonably foreseen or anticipated, or could have been prevented or provided against, then it is not considered an accident, but is negligence in failing to prevent or provide against the happening of the injury.”

We think this fairly describes pure accident. The jury was properly instructed on this point. Lastly it is said that during the argument to the jury one of plaintiff's attorneys stated that the plaintiff had a wife and family to support, which should be taken into consideration in reaching the verdict and assessing the damages. The bill of exceptions discloses that the defendant's attorney objected to the remark mentioned and took an exception to it, whereupon opposing counsel reiterated the statement, and the defendant again objected and took an exception. The court was not called upon to rule upon the question or to instruct the jury to disregard the argument of plaintiff's counsel. Nothing further is disclosed than a colloquy between the opposing attorneys. We cannot reverse a case except for some error of the court. Nothing of the kind is shown here, and hence the defendant can

take nothing on that point. There was testimony on behalf of the plaintiff sufficient to take the case to the jury over the motion for nonsuit made by the defendant.

No error appears in the record, and the judgment is affirmed. **AFFIRMED.**

MR. CHIEF JUSTICE MOORE, MR. JUSTICE BEAN and MR. JUSTICE McBRIDE concur.

MR. JUSTICE EAKIN absent.

Motion to dismiss appeal sustained October 8, 1916.

STATE v. KEENEY.

(159 Pac. 1165.)

Criminal Law—Appeal—Perfecting Appeal—Transcript—Statute.

1. Under Sections 1610, 1611, L. O. L., whereby an appeal becomes perfected by serving and filing with the clerk a notice of appeal, and Section 1621, as amended by Laws of 1913, page 496, providing that on appeal the clerk of the court where the notice thereof is filed must, within 30 days thereafter, or such further time as the court may allow, transmit a certified copy of the notice, certificate of cause, if any, and the judgment-roll, to the clerk of the Supreme Court, an appeal will be dismissed for failure to file the transcript within the time prescribed by law, unless the failure is shown to be due to the negligence of the clerk.

Criminal Law—Perfected Appeal—Subsequent Appeal—Stipulation.

2. Where a defendant perfected his first appeal by serving and filing the notice required by the statute, he thereby exhausted his right of appeal, and it was not within the power of the parties to stipulate for a new notice and a new appeal.

From Multnomah: CALVIN U. GANTENBEIN, Judge.

In Banc. Statement by MR. JUSTICE McBRIDE.

The defendant, Mordie Keeney, was convicted in the Circuit Court of Multnomah County of the crime of arson, and on the ninth day of November, 1915, was

sentenced to imprisonment in the penitentiary. On the fifteenth day of December, 1915, he duly served and filed with the clerk of the Circuit Court a notice of appeal to this court, and upon the same day procured an order extending the time to file a transcript in said cause until ninety days from said date. Subsequently the time for filing such transcript was extended up to and including March 21, 1916. No transcript was filed, and upon April 5, 1916, the defendant served and filed a second notice of appeal, and an order was made extending his time to file his transcript up to and including April 10, 1916. No transcript was filed. On June 15, 1916, defendant served and filed a third notice of appeal, and upon July 6, 1916, the transcript on appeal was filed in this court. The state filed affidavits of Robert Hindman, deputy district attorney, and of the clerk of the Circuit Court, setting forth these facts. The defendant filed counter-affidavits, admitting the principal facts set forth in the affidavits, but with the following explanatory allegations: That prior to March 21, 1916, John A. Collier, the deputy district attorney, who acted for the state in the trial of the cause, orally stipulated that defendant should have 10 days' additional time to file his bill of exceptions and have transmitted to the Supreme Court his notice of appeal, certificate of probable cause, and other documents necessary to perfect the appeal; that no order of the court was entered upon said oral stipulation, but with the consent of said deputy it was determined that a new notice of appeal should be served; that thereafter, on April 5, 1916, a new notice was served, a certificate of probable cause secured, and a proposed bill of exceptions served upon the district attorney, and an order obtained from the court extending the time to file defendant's transcript up to and including April 10, 1916; that thereafter, and

prior to April 10th, at the request of the deputy district attorney, and to enable him to examine the proposed bill, the matter was permitted to proceed until he should have sufficient time to make such examination; that on the ninth day of May, 1916, a written stipulation was entered into between counsel for defendant and said deputy district attorney, stipulating that defendant should have to and including June 1, 1916, to prepare and file his notice of appeal, certificate of probable cause, transcript and bill of exceptions; that prior to June 1, 1916, at the request of the district attorney, further time was granted him in which to file objections to the bill of exceptions; that upon several occasions the presiding judge fixed a date upon which to settle the bill of exceptions, but, although the attorneys for defendant were always ready and willing to proceed, the matter was always continued at the request of John A. Collier, deputy district attorney, representing the state; that no appeal has ever been perfected in this cause until the notice of appeal, bill of exceptions, and bond, and other necessary documents of the transcript, were filed in this court upon the twenty-ninth day of June, 1916, and that said bill was settled and the transcript made up with the express consent of said John A. Collier.

APPEAL DISMISSED.

Mr. Walter H. Evans, District Attorney, for the motion.

Messrs. Littlefield & Maguire, contra.

MR. JUSTICE McBRIDE delivered the opinion of the court.

1. If the appeal was perfected by the service and filing of the first notice, this motion must be allowed, and

such we believe to be the law. In civil cases an appeal to this court is perfected by serving the notice of appeal and filing the necessary undertaking for costs. In criminal cases, there being no undertaking for costs required, the appeal becomes perfected by serving and filing with the clerk a notice of appeal: Sections 1610, 1611, L. O. L. Section 1621, L. O. L., as amended in 1913, provides:

“Upon appeal being taken, the clerk of the court where the notice of appeal is filed must within 30 days thereafter, or such further time as such court, or the judge thereof may allow, transmit a certified copy of the notice of appeal, certificate of cause, if any, and judgment-roll to the clerk of the Supreme Court”: Laws 1913, p. 496.

Under this section we have frequently held that, unless the failure to file the transcript within the time prescribed by law was shown to be due to the negligence of the clerk, the appeal would be dismissed: *State v. Williams*, 55 Or. 143 (105 Pac. 716); *State v. Dickerson*, 55 Or. 390 (106 Pac. 790); *State v. Douglas*, 56 Or. 20 (107 Pac. 957); *State v. Webb*, 59 Or. 235 (117 Pac. 272).

2. The defendant, having perfected his first appeal by serving and filing the notice required by the statute, thereby exhausted his right of appeal: *Schmeer v. Schmeer*, 16 Or. 243 (17 Pac. 864); *Columbia City Land Co. v. Ruhl*, 70 Or. 246 (134 Pac. 1035, 141 Pac. 208); *Brill v. Meek*, 20 Mo. 358. The right of appeal having been exhausted, it was not within the power of the parties to stipulate for a new notice and a new appeal, even if they had done so. A transcript containing the first notice of appeal is not here, and we are not now called upon to pass upon the question as to whether there was a sufficient excuse for defend-

ant's failure to file his transcript pursuant to that notice.

It sufficiently appears that the present appeal was taken after the right to take it had been exhausted, and it is therefore dismissed. **DISMISSED.**

Motion to dismiss appeal allowed October 3, 1916.

BERTIN & LEPORI v. MATTISON.

(159 Pac. 1167.)

Appeal and Error—Disposition—Following Mandate of Supreme Court.

1. Where the mandate of the Supreme Court directs specifically what judgment shall be entered by the lower court, the latter's duty is to follow the direction implicitly; it being, in effect, the judgment of the Supreme Court, which the lower court, after entering, has no authority to set aside, or to grant new trial.

Appeal and Error—Judgment on Remand.

2. An appeal does not lie from a judgment entered by the lower court pursuant to the mandate of the Supreme Court, in the absence of suggestion that the judgment and mandate are broader than essential.

From Clatsop: JAMES A. EAKIN, Judge.

In Banc. Statement by MR. JUSTICE McBRIDE.

Action by Bertin & Lepori against N. Mattison, Martin Franciscovich, and Paul Bakotich. There was verdict for plaintiffs against defendant Franciscovich, whereupon plaintiffs moved for judgment on the verdict against Franciscovich, while the latter moved for a judgment *non obstante* against plaintiffs, which motion was allowed, plaintiffs appealing, the judgment being reversed, and the cause remanded, with directions to enter a judgment for plaintiffs, which was done, defendant Franciscovich moving for a new trial and appealing from denial thereof.

APPEAL DISMISSED.

Mr. Marion B. Meacham and Mr. C. W. Mullins, for the motion.

Mr. George C. and Mr. A. C. Fulton, contra.

MR. JUSTICE McBRIDE delivered the opinion of the court.

This is a motion to dismiss an appeal. The circumstances are as follows: On June 29, 1912, plaintiffs brought an action to recover from defendants upon a promissory note. By a plea in abatement defendants challenged plaintiffs' right to maintain the action, and prevailed in the lower court, but upon appeal here the judgment was reversed, and the cause remanded to the Circuit Court for further proceedings: *Bertin & Lepori v. Mattison*, 69 Or. 470 (139 Pac, 330). Thereafter Franciscovich and Bakotich answered to the merits, and upon a trial before a jury a verdict was returned in favor of plaintiffs and against defendant Franciscovich. Thereupon plaintiffs moved for judgment on the verdict against Franciscovich, defendant Bakotich moved for a judgment for costs against plaintiffs, and defendant Franciscovich moved for a judgment *non obstante* against plaintiffs, which motion was allowed. Plaintiffs appealed to this court, where the judgment was reversed, and the cause remanded to the Circuit Court, with directions to enter a judgment for plaintiffs: *Bertin & Lepori v. Mattison*, 80 Or. 354, (157 Pac. 153). Within one day after the judgment upon the mandate was entered defendant Franciscovich moved for a new trial, which being denied, he caused a bill of exceptions to be prepared and signed and brought his appeal to this court.

1, 2. The rule seems to be invariable that, where the mandate of the Supreme Court directs specifically what judgment shall be entered by the lower court, its duty

is to follow that direction implicitly; it being, in effect, the judgment of the Supreme Court: 3 Cyc. 481; 2 R. C. L., p. 33, § 12; 3 C. J. 541, § 378; *Apex Transportation Co. v. Garbade*, 32 Or. 582 (52 Pac. 573, 54 Pac. 367, 882, 62 L. R. A. 513); *State v. Anthony*, 65 Mo. App. 543. Being in effect the judgment of the Supreme Court, the lower court has no authority after entering such judgment to set it aside or to grant a new trial: *State v. Anthony, supra*. An appeal from such judgment would be, in effect, an appeal to this court from its own judgment. It is possible that the judgment and mandate here was broader than was essential, and that upon a showing that defendants desired to question the rulings of the lower court in the admission or rejection of testimony, or for any other reason, the order would have been restricted to directing the lower court to set aside the judgment *non obstante*, and thereafter to take such further proceedings as should seem proper. Such was the mandate in the case of *Fisk v. Henarie*, 15 Or. 89 (13 Pac. 760), cited by defendants' counsel, and that very circumstance distinguishes that case from the one at bar. But in this case, as in *Apex Transportation Co. v. Garbade*, 32 Or. 582 (52 Pac. 573, 54 Pac. 367, 882, 62 L. R. A. 513), in the absence of such a suggestion, we must hold the judgment conclusive, and not appealable. There is a contention by plaintiffs that defendant Franciscovich should be penalized for a frivolous appeal; but since the amendment of the statute relating to appeals (Laws 1911, p. 152) there has been no case in this court involving this question, and some of the provisions of that amendment furnish at least plausible ground for his contention. While we must resolve the contention against him, we find it far from frivolous.

The appeal is dismissed.

DISMISSED.

Submitted on briefs October 3, affirmed October 5, 1916.

WEBSTER v. BOYER.

(159 Pac. 1166.)

Justices of the Peace—Tenure—"Court"—"Judge."

1. Within Article VII, Sections 1, 2, of the Constitution, as amended November 8, 1910, providing that the judicial power shall be vested in the Supreme Court and such other courts as may be created by law, that the judges thereof shall be elected for six years, and that the courts and judicial system, except as expressly changed by the amendment shall remain as at present till otherwise provided, a Justice's Court is a "court" and a justice of the peace a "judge"; the original sections providing for justices of the peace with limited judicial powers.

From Marion: WILLIAM GALLOWAY, Judge.

In Banc. Statement by MR. JUSTICE McBRIDE.

This is a suit for injunction by Daniel Webster against U. G. Boyer.

The complaint shows that at the general election for 1912 the plaintiff was elected justice of the peace for Salem precinct, in Marion County, and still holds said office; that at the primary nominating election held in May, 1916, R. C. Wygant was nominated for justice of the peace for said precinct, and a certificate of nomination issued to him; that the defendant, the county clerk, unless restrained, will place the name of said Wygant upon the official ticket to be voted at the ensuing November election, and, as the said Wygant is the only candidate for said office, the defendant will after such election issue to him a certificate of election, thereby causing irreparable injury and interminable confusion by reason of the fact that there will be two persons each claiming to hold and exercise the duties of justice of the peace in said precinct. Other allegations not necessary to detail here appear. The prayer of the complaint is for an order enjoining defendant

from placing Wygant's name upon the ballot. That part of the Constitution applicable to this case is found in Article VII, Sections 1 and 2, as amended November 8, 1910, which are as follows:

“The judicial power of the state shall be vested in one Supreme Court and in such other courts as may from time to time be created by law. The judges of the Supreme and other courts shall be elected by the legal voters of the state or of their respective districts for a term of six years. * * The courts, jurisdiction, and judicial system of Oregon, except so far as expressly changed by this amendment, shall remain as at present constituted until otherwise provided by law. * * ”

There was a demurrer to the complaint, which being overruled, and defendant refusing to plead further, there was a decree enjoining defendant from placing the name of R. C. Wygant upon the ballot, from which decree defendant appeals.

Submitted on briefs under the proviso of Supreme Court Rule 18: 56 Or. 622 (117 Pac. xi).

AFFIRMED.

For appellant there was a brief submitted over the name of *Mr. Ernest R. Ringo*, District Attorney.

For respondent there was a brief presented over the names of *Messrs. McNary & McNary* and *Mr. Everil M. Page*.

MR. JUSTICE McBRIDE delivered the opinion of the court.

1. Two questions are raised by the briefs upon this appeal: Is a Justice's Court a “court” and is a justice of the peace a “judge” within the meaning and intent of Article VII of Sections 1 and 2 of the Constitution? We answer both questions in the affirmative. Article

VII of Sections 1 and 2 of our original Constitution were as follows:

“The judicial power of the state shall be vested in a Supreme Court, Circuit Courts and County Court, which shall be courts of record, having general jurisdiction, to be defined, limited and regulated by law, in accordance with this Constitution. Justices of the peace may also be invested with limited judicial powers, and municipal courts may be created to administer the regulations of incorporated towns and cities. The Supreme Court shall consist of four justices, to be chosen in districts by the electors thereof, who shall be citizens of the United States, and who shall have resided in the state at least three years next preceding their election, and after their election, to reside in their respective districts. The number of justices and districts may be increased, but shall not exceed five, until the white population of the state shall amount to one hundred thousand, and shall never exceed seven; and the boundaries of districts may be changed, but no change of district shall have the effect to remove a judge from office, or require him to change his residence without his consent.”

It will be observed that the sections as amended omit all reference to justices of the peace *eo nomine*, but vest judicial power in the Supreme Court and “such other courts as may from time to time be provided by law.” But for the proviso in Article VII, Section 2, the whole system of Circuit Courts, County Courts, and Justices’ Courts would have been repealed. If Justices’ Courts exist now, it is because they are included among the courts preserved by the terms of Section 2. It is not conceivable that the framers of the amended Article VII intended to abolish Justices’ Courts and thus leave a hiatus in our judicial system to be filled by subsequent legislation. The Constitution of Georgia (Article VI, Section 1) is similar to

our original Constitution in respect to the distribution of judicial powers. It reads:

“The judicial powers of this state shall be vested in the Supreme Court, Superior Courts, courts of ordinary, and justices of the peace.”

In *State v. Port* (C. C.), 3 Fed. 117, 123, the court in construing this provision says:

“A justice of the peace is therefore an officer, clothed with judicial powers, when acting in his capacity, and within his jurisdiction he is, to all intent and purposes, a court.”

See, also, *Tissler v. Rhein*, 130 Ill. 110 (22 N. E. 848); *Scott v. Spiegel*, 67 Conn. 349 (35 Atl. 262).

In our statutes and reports, as well as in common parlance, the proceedings before a justice of the peace are always referred to as proceedings in “Justices’ Courts,” and it is only fair to presume that when the amendment of 1910 speaks of courts it was intended to include all courts and all tribunals then generally called and recognized as courts. Being by the Constitution invested with judicial powers, it would seem to follow naturally that a justice of the peace is a judge. By title he is a justice of the peace, by function he is a judge—just as judges of this court are by title justices, and by function judges. In New York it has been frequently held that statutes relating to judges should be construed as applying to justices of the peace. Thus, where the statute declared that no judge of any court could sit in any cause in which he was interested, it was held that the term “judge” included a justice of the peace: *Edwards v. Russell*, 21 Wend. (N. Y.) 63; *Baldwin v. McArthur*, 17 Barb. (N. Y.) 414; *Foot v. Morgan*, 1 Hill (N. Y.), 654. And so, where the statute declared that no judge of any court should have a voice in the decision of any cause

in which he had been attorney or solicitor, it was held that a justice of the peace was a judge within the meaning of the law: *Carrington v. Andrews*, 12 Abb. Pr. (N. Y.) 348.

We are of the opinion that a Justice's Court is a court and a justice of the peace a judge within the meaning and intent of Article VII, Sections 1 and 2, of the Constitution, as amended in 1910; and that plaintiff is entitled to hold the office of justice of the peace for the term of six years from January 1, 1913.

The decree of the Circuit Court is affirmed.

AFFIRMED.

Argued September 18, defendant disbarred October 10, 1916.

STATE EX REL. v. FARRIN.

(160 Pac. 124.)

Payment—Right to Receipt.

1. Under section 876, L. O. L., providing that whoever pays money is entitled to a receipt therefor from the person to whom the payment is made, and may demand a proper signature as a condition of the payment, an attorney employed to collect claims, who kept his clients advised of the true state of the business, and promptly, on receipt of their money from the debtor, paid them what was due them under the agreement for collection, was entitled to a receipt for the money.

Attorney and Client—Suspension—Deceit—Statute.

2. Under section 1092, L. O. L., providing that an attorney may be removed or suspended for being guilty of any willful deceit or misconduct in his profession, where an attorney, handling claims for collection, after being notified by the debtor that it would pay in full on presentation of the bill, wrote his client to ascertain the least the claim would be compromised for, thus intimating that the matter was yet unsettled, and, after receiving two checks for the amount of the claim from the debtor, which he indorsed without authority and cashed, did not admit that he had collected the money until his client had direct communication with the debtor, such attorney will be suspended from membership of the bar for one year.

[As to causes and proceedings for disbarment of attorneys, and the power of courts to disbar, see notes in 95 Am. Dec. 333; 45 Am. St. Rep. 71.]

Original proceeding in disbarment.

Department 1. Statement PER CURIAM.

Original proceeding by the State of Oregon before the Supreme Court, on the relation of John McCourt, John H. McNary, O. P. Coshaw, Loring K. Adams and Alfred Hampson, comprising the grievance committee of the Oregon Bar Association, to secure the disbarment of George N. Farrin, as a practicing lawyer. Defendant suspended from membership of the bar of the court for one year.

DEFENDANT SUSPENDED.

Mr. Elton Watkins, for the relators.

Mr. C. H. Libby, for defendant.

Opinion PER CURIAM.

This is an original proceeding in this court in the name of the state upon the relation of the grievance committee of the Oregon Bar Association to secure the disbarment of the defendant as a practicing lawyer. He was associated with Frank G. Micelli in the practice of law in Portland. It is stated in the complaint and admitted in the evidence that Micelli had nothing whatever to do with the transaction in question, and is not in any way to blame or responsible for the matters of which complaint is made. For convenience of designation, therefore, the defendant will be referred to as such or as the firm. Two brothers, J. A. and Alvin Smith, had a demand of \$200 each against the Weyerhauser Land Company to be mentioned as "the company" for patrolling timber lands in southern Oregon during the year 1910. They were somewhat in doubt about who was liable to them for their services and had been unable

to collect for them. During the month of April, 1914, they placed their claim in the hands of the firm of Farrin & Micelli for collection. The business was intrusted entirely to the defendant Farrin. The company had a Portland office and also one in Tacoma, Washington. The defendant on April 13th addressed a letter over his firm name to the company demanding payment of the claim. The latter responded promising to look into the matter, saying that the transaction in the beginning was under the supervision of an agent then in Washington, D. C., and that it should receive prompt attention and decision on his return. This phase of the matter was the subject of several letters from the company to the firm. On May 22, 1914, he wrote to them a very sharp demand for the payment of the money. On June 1, 1914, writing from the Tacoma office the company informed the firm that Mr. McCormack the agent already mentioned recommended payment in full of the claim of \$400, and closed by saying in substance that if the defendant would submit a bill for the amount the company would send to him a check for it. On the 3d of the same month the company writing from Tacoma to the defendant acknowledged his letter with the bills of the Smiths for \$200 each, and returned them, with two checks for the same, payable to the order of the Smiths for \$200 each, and asked the defendant to have the bill receipted and mailed to the company. On this same third day of June, 1914, although he had been notified as stated by the letter of the company of date June 1st that the bills would be paid in full on presentation, the defendant in the firm's name wrote to Alvin Smith to this effect:

“I have been continually working on the case of yourself and brother J. A. v. Weyerhauser Timber Company with very much success.”

He then continues substantially asking that the Smiths let him know the least they would compromise for, stating that he thought he could get \$100 or possibly \$200 in full settlement of all claims, and closed by asking his addressee to tell him the best he would do, and that in turn the writer would do the best he could in the matter. The next in order in the correspondence is a letter from the company to the defendant reminding him that on June 3d, the company had sent him two checks for \$200, but had had no acknowledgment of the same. On that same date the company wrote J. A. Smith, stating that they had sent to the firm on June 3d checks covering the amount. On July 6th the company notified the firm about having written to the Smiths on the subject. Following this, on July 8th, the defendant wrote to the Smiths, saying:

“We have succeeded in getting a settlement from the Weyerhauser Timber Company for your account and are sending you herewith receipts to sign. Upon receiving the same we will forward a check to you.”

On July 13th Alvin Smith wrote to Micelli an individual letter informing him that the Smiths had received a letter from the company, saying that they had paid the firm on June 3d and demanding that the amount be forwarded to the Smiths without delay, saying that they could not receipt for the money until they received it. On July 16th the defendant wrote to Smith substantially that the Weyerhauser firm was willing to settle, but not until they got a receipt for \$200 each, and requested them to send such; that the defendant's firm would hold it and get such settlement as they could turning over the receipt and sending to the Smiths their amount of the collection. On July 18th Alvin Smith wrote to the firm declaring

that in their letter of July 8th already referred to they did not send any receipts. He again called attention to the fact that the company claimed to have made payment on June 3d. Again on July 18th the company reminded the defendant's firm that Smith claimed not to have received the money in payment of his claim and requested that the defendant get the Smiths' receipts. Finally, on August 31st, the matter seemed to have gotten into the hands of John D. Goss of Marshfield. Acting for the Smiths, he addressed a letter to the firm, saying that the Smiths refused to sign the receipts for \$400 on payment of only \$200. He recited a history of the transaction, quoted parts of the letters to the Smiths, demanded that the defendant pay \$360, and suggested sending the money to the First National Bank at Marshfield to be paid on delivery of the receipts. On September 10th the defendant replied in his firm name to Goss, saying he was ready to pay the Smiths \$100 received on the collection on execution of a receipt to Weyerhauser, and declared that the money would be held by the defendant's firm until the receipt was sent through the bank to be paid the Smiths on delivery of the receipt in full, the defendant's firm retaining one half of the collection, as he stated, "according to agreement." At the bottom this is initialed F. G. M., E. E. L., as though F. G. Micelli had dictated to the stenographer, whose initials were E. E. L. The defendant admits that he himself wrote this letter. The last chapter in the exhibits on the case are two receipts, "*pro tanto*" one from each of the Smiths for \$100 to the Weyerhauser Land Company under date of January 30, 1915.

Alvin Smith testifies that he put the account into the hands of the firm for collection to compromise or

do any way to get it or any part of it and he would be satisfied. He says there was nothing said about the charge for collection. Micelli says there was nothing definite stated on that subject. On the other hand, the defendant declares that afterward Smith returned to the office and told him he would give him one half of the amount collected as his fee for his services. Without any authority except what might be implied by having been intrusted with the collection of the claim, Farrin indorsed the two checks sent by the company writing the name of the payee on the back, Alvin Smith in one case, and J. A. Smith in the other. The two names are written in different handwriting. They are not signed Alvin Smith by G. N. Farrin, and J. A. Smith by G. N. Farrin, but simply the names of the payee. He attributes the difference in the appearance of the two names he wrote on the checks to the fact that, as he states, he used a sharp pen for one and a stub pen for the other. He delivered these to a man named Cone, who negotiated them to the Scandinavian-American Bank in Portland on June 5, 1914, receiving his money on the Alvin Smith check and depositing the other for collection. The latter was finally paid and the defendant received the entire proceeds of \$400. Micelli testifies that when he received the individual letter from the Smiths he asked the defendant if he had collected the money, and the latter responded that he had not. This letter was dated July 13, 1914.

There is no distinct admission in any of the defendant's letters that he had the money until September 10, 1914, in answer to the letter from Goss. On the contrary, after having been notified by the company in its letter of June 1st that they would pay the full amount of \$400 on presentation of the bill, he wrote

to Alvin Smith and wanted to know the least the claim would be compromised for, intimating that the matter was yet unsettled. It is a marked coincidence that it was not until the Smiths had direct communication from the company and he had been stirred up by the letter of Goss that the defendant directly admitted that he had collected the money. The tone of his correspondence up to that time was to the effect that the company was demanding a receipt direct from the Smiths as a condition precedent to paying the money, when in fact the company had made receipts a condition subsequent. It is not altogether a dispute between an attorney and his client about the fee of the former.

1, 2. It is said in Section 1092, L. O. L.:

“An attorney may be removed or suspended by the Supreme Court for either of the following causes, arising after his admission to practice. * * 3. For being guilty of any willful deceit or misconduct in his profession. * * ”

The quality of deceit is written large throughout the correspondence of the defendant with his clients. Knowing full well that the claim would be paid in full on presentation, he magnifies his office and pretends that the matter is still open for adjustment and compromise. This was evidently intended to deceive and mislead those whom he represented. If he could have been equipped with receipts in full for the \$400 he might have pocketed the entire amount and flaunted them in the face of his clients as a bar to their claim for the money.

It was his duty to keep his employers advised of the true state of the business and promptly on receipt of their money to have paid them their just dues, whether it be 50 or 90 per cent of the collection. On

doing so he would have been entitled to a receipt for the money, under Section 876, L. O. L., reading thus:

“Whoever pays money, or delivers an instrument or property, is entitled to a receipt therefor, from the person to whom the payment or delivery is made, and may demand a proper signature to such receipt as a condition of the payment or delivery.”

Evidently these are concurrent conditions, and he had no right to demand a receipt in full as a condition precedent to sending them the money. If he had desired to act fairly and honestly with the Smiths he could have sent the money promptly to some responsible banking institution near their residence with instructions to pay it to them on execution of the necessary receipts.

The conduct of the defendant is not in accordance with the ethics of the profession, and, for the protection of the court and of clients in general, for the proper administration of justice, and to maintain the dignity and purity of the practice of law, it is ordered that the defendant be suspended from a membership of the bar of this court for the period of one year.

DEFENDANT SUSPENDED.

Argued September 12, affirmed October 10, 1916.

STATE v. STILES.*

(160 Pac. 126.)

Embezzlement—Larceny by Bailee—Evidence—Sufficiency.

1. In a prosecution for larceny by bailee, alleged to have been committed by a real estate broker in retaining as a commission a sum of money received from a prospective purchaser as a first payment of purchase price, evidence *held* sufficient to sustain a finding that the purchaser parted with title to the money conditionally and only in case her proposal to give a chattel mortgage in part payment should be accepted by the owner of the property.

[As to what constitutes, and who may commit, embezzlement, see note in 87 Am. St. Rep. 19.]

Criminal Law—Appeal and Error—Review—Invited Error.

2. Where defendant's counsel on direct examination asked the owner of the property if he confirmed the sale as reported to him, error in permitting the witness on cross-examination to answer substantially the identical question, which called for a conclusion of the witness, was invited.

Embezzlement—Evidence—Admissibility—Statute.

3. Under Section 1956, L. O. L., making it larceny for any bailee of money, etc., to wrongfully convert or neglect or refuse to deliver or account for money bailed, etc., according to the trust, intent not being an element of the crime, the exclusion of testimony of the owner of the property tending to show the intent with which the money was retained by the broker was not error.

Criminal Law—Trial—Instructions—Assuming Facts.

4. A requested instruction that if the jury found that the owner of the property approved the terms of the contract of sale at or about the time it was signed then the sale was confirmed according to the terms of the contract, and there would be no larceny by defendant in retaining the money, and they should acquit defendant, was properly refused as assuming that certain terms offered by owner were accepted by prospective purchaser, and not submitting the question whether such a contract was consummated.

Embezzlement—Trial—Instructions.

5. A requested instruction that under the terms of the contract in evidence when the money was delivered to defendant, title passed with possession, and its retention would not constitute larceny, was properly refused, there being evidence that the money was delivered conditionally.

*For authorities passing on the question, effect of fact that one entitled to commissions out of fund, upon his prosecution for embezzlement, in case he retains the whole sum, see note in 13 L. R. A. (N. S.) 511.

Criminal Law—Trial—Instructions.

6. An instruction defining the word "bailee," although not predicated on any evidence, was not error, since the defendant having been charged with the crime of larceny by bailee, the definition of the word, or a general description of the relation which it implies, was proper.

Criminal Law—Trial—Instructions.

7. An instruction that if the state proved beyond a reasonable doubt that the sale was not confirmed, that the money was delivered to defendant and that defendant failed to return it on demand, and contrary to the provision of his trust, the jury should find defendant guilty, the remainder of the instruction to which no exception was taken being that if the state failed to prove these various propositions beyond a reasonable doubt, the jury should find defendant not guilty, was properly given, as supported by evidence that the money was delivered to defendant conditionally.

From Multnomah: CALVIN U. GANTENBEIN, Judge.

The defendant, H. A. Stiles, was indicted, tried and convicted of the crime of larceny by bailee, and he appeals. A statement of the facts will be found in the opinion of the court. **AFFIRMED.**

For appellant there was a brief over the names of *Mr. Wilson T. Hume* and *Mr. H. Daniel*, with an oral argument by *Mr. Hume*.

For the State there was a brief over the names of *Mr. C. C. Hindman*, Deputy District Attorney, and *Mr. Walter H. Evans*, District Attorney, with an oral argument by *Mr. Hindman*.

Department 2. Opinion by MR. CHIEF JUSTICE MOORE.

It is contended that an error was committed in denying motions, interposed when the state had introduced its evidence and rested, and also when all the evidence had been received, to direct the jury to return a verdict for the defendant, on the ground that the evidence disclosed the money alleged to have been misappropriated was paid over to him pursuant to a

written contract whereby the title to the property passed with a delivery of the possession. The evidence shows that the defendant is a real estate broker and engaged in that business at Portland, Oregon, that F. F. Waffle, Emma Waffle and Maude M. Kent, on March 27, 1914, were the lessees of the John A. Nelson farm, situate near Warren, Oregon, and the owners of livestock, farming implements and hay then on the demised premises, at which date they executed to the defendant a writing whereby he was authorized, within 15 days, to secure an assignee of the lease and a purchaser of the stock, etc., "for the sum of \$3,250 net to us, all cash for the equipment, and assume the said lease." The writing contains the following clauses relating to the defendant, viz.:

"And you are hereby authorized to accept a deposit on the purchase price, and to execute a binding contract on our behalf. If the above-described property is sold within the life of this contract to any purchaser to whom you have submitted and offered the property during the term of this agreement, we hereby agree to pay you all over \$3,250 that you sell for as commission, and you are hereby authorized to retain said commission out of any money which may be paid to you on account of said purchase price or as a deposit."

The limitation thus prescribed, within which a sale of the property might be made, was orally extended by the owners from time to time. Pursuant to such authority the defendant advertised the property for sale for \$4,000, whereupon Mrs. Elizabeth C. Ross, having seen the published notice, called at his office and inquired about the lease, the livestock and the hay. She then owned in Portland a house and lot, estimated to be worth \$3,500, which real estate was subject to a mortgage of \$800, and she desired to execute a deed of her home in part payment of the con-

sideration stated in the advertisement. Soon thereafter the defendant with an automobile took her and two young men who subsequently became her sons-in-law to the Nelson farm, where they inspected the property offered for sale. Mrs. Ross testified that having talked with Mr. Waffle she said to the defendant on the return journey:

“Mr. Stiles, I don’t see what you fetched us down here for. This is a cash proposition.”

He replied:

“Never mind that. Just leave that to me. We don’t have to have \$2,000 cash.”

She also stated upon oath that in a day or two the defendant notified her he had prepared a contract for the purchase of the property and desired her to call and sign the agreement. She complied with the request, saying:

“When Mr. Stiles handed me the contract to sign there were certain things we had to meet before I could raise the \$2,000, and Mr. Stiles understood this completely. I told Mr. Stiles ‘I don’t think I ought to sign that contract until I hear from Mr. Jackson.’ He was the man that held the \$800 mortgage on my place at this time, and the one that I wanted to get it increased with. ‘If he didn’t come through with what I want, I can’t raise that \$2,000.’ Mr. Stiles says, ‘Never mind, Mrs. Ross, I am making about \$500 a month. I will help you out of that if you can’t get it from Mr. Jackson.’”

She signed the contract May 16, 1914, then orally offering to pay \$2,000 in cash and to give a chattel mortgage on the property as security for the remainder of the purchase price. She hoped by executing a new mortgage on her home for \$2,300 to have \$1,500 remaining after discharging the prior lien and

in order to obtain the latter sum the defendant agreed to apply to Mr. Jackson therefor. Mrs. Ross also expected to secure from a Mrs. Fisher a loan of \$600 and from George G. Allison \$300, thus making \$2,400 with which to pay the \$2,000 on account of the purchase of the stock, implements and for an assignment of the lease, and to defray the expense of moving to the farm. At the time the contract was signed the defendant desired her to make a deposit with him of some money on account of the agreement, and three days thereafter she took to him a check for \$200 for that purpose, whereupon a receipt therefor was indorsed on the agreement above the signature of the parties. The contract was a printed form on which the written part left meaningless the impressed word "dollars," now marked by parentheses. The amended writing reads:

"This agreement entered into this 16th day of May, 1914, by and between H. A. Stiles, of Portland, Or., and Mrs. E. C. Ross, purchaser, address 5204 43d St. S. E., Portland, Oregon, witnesseth: That H. A. Stiles, agent, agrees to sell, and the aforesaid purchaser agrees to buy the stack of feed and implements on the John A. Nelson farm, 1 $\frac{3}{4}$ miles west of Warren, Or., according to a list already submitted, and take over the lease now held by F. F. Waffle and associates, subject to confirmation by owners, for the purchase price of \$4,000, including the rent to April, 1915 (dollars) upon the following terms: \$2,000 cash when papers are ready, balance to be arranged, and a part of the old hay and hogs that may be sold is to be applied on the balance when sold and subject to as many conditions and restrictions as may run with the land. It is further agreed that Mrs. Ross is to have credit for the hogs and calves, etc., that has been sold off the farm by F. F. Waffle. H. A. Stiles hereby acknowledges receipt of \$200, May 19th (dollars) as earnest-money and part of the purchase price, which

deposit shall be returned in case owner does not confirm sale.

“H. A. STILES, Agent,

“By R. A. STILES.

“Mrs. E. C. Ross, Purchaser.”

Mrs. Ross further testified that upon paying \$2,000 on the purchase price of the property she expected to secure the remainder by giving a mortgage upon the stock, implements and crop; that she did not understand the chattel mortgage was not satisfactory; that she paid the \$200 on Mr. Stiles' word that if a further loan could not be secured from Mr. Jackson the defendant would help her; that failing to get the money from the mortgagee, Mr. Stiles could have obtained from another source a loan upon her home of only \$1,250; that if he had been able to secure a loan of \$1,850 she, with the help of Mrs. Fisher and Mr. Allison, could have raised the \$2,000 required by the terms of the contract; that when the defendant heard from Mr. Jackson and she was notified he could not let her have the money, she abandoned the idea of giving a chattel mortgage; that no bill of sale of the stock, etc., was ever tendered to her, no demand made upon her for a commission; that the \$200 which she paid had never been returned to her; and that the proposed sale was never confirmed.

Her testimony is corroborated in most particulars by that of F. E. Olson, a son-in-law, who went in the automobile with her to examine the property offered for sale and who was also with her May 16, 1914, when she signed the contract. This is the substance of the testimony which was received when the first motion for a directed verdict was interposed.

F. F. Waffle, a witness for the defendant, was interrogated on direct examination as follows:

"I will ask you to state whether or not on the 19th day of May of this year you saw that contract."

He replied:

"Mr. Stiles showed me the contract, but I didn't read it. He told me that he had received \$200 from Mrs. Ross under certain conditions, if she could put the deal through, and she could put the deal through if I would accept her terms; but I didn't read this at that time.

"Q. Did you confirm the sale as he had reported it to you?

"A. Well, no.

"Q. What did you tell him?

"A. He told me that Mrs. Ross could pay us \$2,000 cash, if we would give her time on the balance, and I says, 'What security will she give?' And he says, 'A chattel mortgage on the stock.' I told him, No, I couldn't accept a chattel mortgage on the stock, but I would accept the \$2,000 cash, if she could give us security, bankable notes, or a first mortgage on Portland real estate, and he said he thought he could put it through that way.

"Q. Then the provision in the contract of the \$2,000 cash, and the balance to be arranged, that was approved by you?

"A. In that way; that I would accept—

"Q. To be arranged satisfactorily to you?

"A. Yes, sir; with the proper security.

"Q. The sale was confirmed then, as far as you were concerned, according to that arrangement; \$2,000 cash and the balance to be arranged to your satisfaction?

"A. Yes, sir.

"Q. And did Mr. Stiles have authority to retain the \$200 that was paid on the purchase price?

"A. Not from me; no."

The witness was further interrogated as follows:

"Q. This is the contract that you had with him, is it not? Examine that paper. Do you recognize those signatures?

“He answered: Yes, sir; those signatures are correct. There is one mistake here, the amount of the price, \$3,250. It should read \$3,650. Oh, I understand; that was in addition to the lease. I think we covered that. * *

“Q. Would you have sold to Mrs. Ross, if she had complied with the terms of this contract of \$2,000 cash and a satisfactory arrangement for the other \$2,000?

“A. Yes, sir.”

J. W. Hammond, a witness for the defendant, testified that as a loan broker he, about the middle of May, 1914, at the request of Mr. Stiles, examined the house of Mrs. Ross and offered to make a mortgage loan thereon of \$1,850, but he never thereafter heard anything about the matter. Mr. Hammond's testimony is corroborated by that of Mr. Stiles who, in referring to Mrs. Ross, says:

“As soon as she paid me the deposit, I immediately got in my machine, after talking with Mr. Hammond, and found I could raise the money on mortgage on her property, and I went down there and talked with Mr. Waffle”

—informing him that Mrs. Ross was going to pay \$2,000 in cash and proposed to give a mortgage on the property offered for sale as security for the remainder of the purchase price, which offer was declined by Mr. Waffle who demanded negotiable paper which could readily be converted into cash; that when the witness found there was a mortgage of \$800 on the house of Mrs. Ross, it was then ascertained she did not have sufficient funds with which to complete the contemplated purchase.

Mrs. Ross testified that when she learned she was unable to secure any further loan from Mr. Jackson, the man who held a mortgage of \$800 on her home, she called upon the defendant to whom she said, “Mr.

Stiles, I came down for that money," meaning the \$200 she had left with him. "He says, 'Mrs. Ross, I put that check in the bank for safe deposit'; and he says, 'My bank account has been garnished, and you will have to wait a few days before I can pay you.' " The evidence shows he wrote her several letters promising to repay the money which he had received from her as soon as he could obtain that sum. The defendant referring to these letters says they were written while sympathizing with her for the loss and not because he considered he was under any legal obligation to repay the amount which he had earned as commission for negotiating a sale of the property and as liquidated damages for the expense he had incurred.

1. The phrase in the written contract, referring to the payment of \$2,000 on the purchase price, "balance to be arranged," renders uncertain the payment of, or the security for the remainder of the purchase price. The writing is not complete, but ambiguous, and in order to explain the meaning of the phrase last quoted evidence was admissible for that purpose. The testimony given by the witnesses appearing for the state tended to show that the defendant received \$200 as a part of the \$2,000 to be paid, if the owners of the property would accept a chattel mortgage thereof to secure the payment of \$2,000, the remainder of the purchase price, and that if such an agreement could not be consummated, the money so deposited was to be returned. This evidence was sufficient, if believed by the jury, to show that Mrs. Ross parted with the title to the money conditionally and only in case her proposal to give the chattel mortgage should be accepted by the owners of the property: *State v. Skinner*, 29 Or. 599 (46 Pac. 368); *State v.*

Germain, 54 Or. 395 (103 Pac. 521). No errors were committed in denying the motion to direct a verdict for the defendant.

2, 3. On the direct examination of F. F. Waffle he was asked by the defendant's counsel: "Did you confirm the sale as he had reported it to you?" referring to the defendant's statement of the offer of Mrs. Ross to give a chattel mortgage of the property as security for the payment of \$2,000. The witness replied, "Well, no." On cross-examination Mr. Waffle was asked: "So in regard to the terms of the sale, the contract which Mr. Stiles offered you on behalf of Mrs. Ross in his interview—you never confirmed that sale or contract, did you?" An objection to this inquiry on the ground that it called for the conclusion of the witness was overruled and an exception allowed, whereupon the witness replied, "No, sir." In permitting this question to be answered it is maintained that an error was committed. It will be seen that substantially the identical question complained of on the cross-examination of Mr. Waffle was asked by the defendant's counsel of that witness on direct examination. No objection was interposed to the first inquiry, it is true, but a sense of fairness on the part of the trial court evidently prompted the overruling of the objection, on the theory that the error, if any, was invited: *Capital Lumbering Co. v. Learned*, 36 Or. 544 (59 Pac. 454, 78 Am. St. Rep. 792). Mr. Waffle was interrogated by defendant's counsel as follows:

"If Mrs. Ross had given you \$2,000 cash and had given you a bankable note of Mr. Olson's, secured by a mortgage, or any other person, for \$2,000, you would have transferred the property to her, would you not, described in that contract?"

"A. Yes, sir."

“Q. And Mr. Stiles would have kept the \$200, would he not?”

An objection to this question having been sustained and an exception allowed, it is maintained that an error was committed in not permitting the witness to answer the inquiry. In discussing this ruling it is stated in the brief of defendant's counsel:

“We contend that the defendant was entitled to this evidence. One of the essential features of a prosecution for larceny is the intent with which the property is retained, and the answer of the witness, Waffle, was relevant to be considered by the jury in determining the question.”

In *State v. Chapin*, 74 Or. 346 (144 Pac. 1187), it was held that under Section 1956, L. O. L., making it larceny for any bailee of money, etc., to wrongfully convert or neglect or refuse to deliver or account for the money bailed, etc., according to the trust, intent to defraud was not an element of the crime. The decision in that case is conclusive on this point, showing that no error was committed as alleged.

4. An exception having been reserved, it is insisted by defendant's counsel that an error was committed in refusing to give the following requested instruction:

“If you find from the evidence in this case that Waffle, the owner, consented to and approved the terms of the contract of sale at or about the time the same was signed, then I charge you the sale was confirmed according to the terms of the contract, and there would be no larceny by the defendant in retaining the money in controversy and you should acquit the defendant.”

This instruction assumes that Waffle's offer to take mortgages of real property in Portland, Oregon, as security for \$2,000, upon the payment of a like sum in money, was accepted by Mrs. Ross. This seems to

be the theory of the defendant, but such hypothesis is denied by Mrs. Ross, who testified that no contract to that effect was made. The request does not submit to the jury the question of whether or not such a contract was consummated, and, this being so, no error was committed as alleged.

5. It is maintained that an error was committed in refusing to give the following requested instruction:

“I charge you that under the terms of the contract in evidence when the money, \$200, was delivered to the defendant, the title passed with the possession, and the retention of the money would not constitute larceny, and you should acquit the defendant.”

What has been said on the denial of the motion for a directed verdict is controlling as to this requested instruction, in refusing to give which no error was committed.

6. It is contended that an error was committed in charging the jury as follows:

“Now, the word ‘bailee’ is used in this indictment. When property is delivered by one person to another with the understanding that the identical property or its equivalent is to be returned to him, the person who delivered the property is called the bailor, and the one to whom it is delivered is called the bailee; and so in this case if the defendant received the money as alleged in this indictment, he would be the bailee.”

It is argued that this part of the charge, though correctly stating a legal proposition, was not based on any testimony, and hence was abstract and misleading. Unless an instruction is predicated on evidence which has been received, it is unrelated to the case on trial and usually erroneous: *Pearson v. Dryden*, 28 Or. 350 (43 Pac. 166); *State v. Weaver*, 35 Or. 415 (58 Pac. 109); *State v. Hogg*, 64 Or. 57 (129 Pac. 115); *Oberlin v. Oregon-W. R. & N. Co.*, 71 Or.

177 (142 Pac. 554). The defendant having been charged with the crime of larceny by bailee, the definition of that word or a general description of the relation which it implies was proper, in order that a correct understanding of the term might have been gained by the jury: *State v. Anderson*, 10 Or. 448, 459; *State v. Hinton*, 56 Or. 428 (109 Pac. 24). An examination of this instruction when construed in connection with the entire charge shows that no error was committed in giving the language complained of.

7. It is insisted that the following instruction was not supported by the evidence, and that an error was committed in saying to the jury:

“If, then, the state has proved to you beyond a reasonable doubt that the sale was not confirmed, and that the \$200 were delivered by the complaining witness to the defendant, and that the defendant failed to return the money to the complaining witness on demand, and contrary to the provisions of his trust, then it would be your duty to find a verdict of guilty as charged in the indictment.”

The concluding part of this instruction, and to which no exception was taken, reads:

“But if, on the other hand, the state has failed to prove to you beyond a reasonable doubt these various propositions, then it would be your duty to find a verdict of not guilty.”

The question presented by the last instruction to which an exception was taken is discussed in considering the motion to direct a verdict for the defendant, and needs no further elucidation.

The judgment should be affirmed, and it is so ordered.

AFFIRMED.

MR. JUSTICE EAKIN and MR. JUSTICE McBRIDE concur.

MR. JUSTICE BEAN dissenting.

Argued September 13, affirmed October 10, 1916.

STATE v. McCLARD.

(160 Pac. 130.)

Criminal Law—Evidence—Other Offenses—Admissibility.

1. As a general rule, evidence of other and distinct crimes than that charged in the indictment cannot be given.

Criminal Law—Burning to Defraud Insurer—Evidence of Other Offenses.

2. Such rule is subject to exception in prosecutions for burning property to defraud the insurer, and evidence that accused secured insurance on other property at a different place, and the property was burned very soon thereafter, is admissible as tending to show the intent.

[As to admissibility of testimony as to intention, see note in Ann. Cas. 1912D, 1043.]

Criminal Law—Appeal—Scope—Preservation of Exceptions.

3. It is the duty of the accused in his bill of exceptions to negative the existence of evidence which might, under some theory, render admissible that which was excepted to, or to negative any theory under which it might be admissible, and if he does not do so, the court cannot say that the evidence complained of was inadmissible.

From Marion: PERCY R. KELLY, Judge.

Department 1. Statement by MR. JUSTICE McBRIDE.

The defendant, Fred McClard, was indicted for the crime of burning property with intent to injure and defraud the insurer, which crime it was alleged was committed on the seventh day of November, 1915. There was evidence tending to show that on the thirtieth day of October, 1915, he procured insurance in the North British & Mutual Insurance Company upon certain household goods, consisting principally of clothing and personal effects and then being in a frame building situated at 1745 Court Street, Salem, Oregon; that on November 7th a fire occurred in his room which totally destroyed the contents, and that a claim with an itemized list of the articles destroyed,

amounting in alleged value to \$239.40, was duly presented to the insuring company. The state introduced with other testimony not shown in the bill of exceptions evidence tending to show that on March 8, 1916, defendant applied for and received insurance in the Pacific Fire Insurance Company upon a similar class of goods, situated in a dwelling-house at 1223 Ferry Street, Salem, Oregon, and that on the fifteenth day of the same month a fire occurred in his room whereby the alleged goods were destroyed, and he made proof of his loss and received \$207 in satisfaction thereof. It also appeared that the goods in his room at Ferry Street were brought there contained in two suitcases, and two suitcases are listed among the items embraced in the proof of loss. To the introduction of this testimony defendant's counsel objected as being irrelevant, which objection was overruled by the court; and the defendant, having been convicted and sentenced, appeals.

AFFIRMED.

■ For appellant there was a brief over the name of *Messrs. Smith & Shields*, with an oral argument by *Mr. Guy O. Smith*.

For the State there was a brief over the names of *Mr. Elmo S. White*, Deputy District Attorney, and *Mr. Ernest R. Ringo*, District Attorney, with an oral argument by *Mr. White*.

MR. JUSTICE McBRIDE delivered the opinion of the court.

1, 2. The principal question discussed here is the admissibility and sufficiency of the evidence as to another and similar occurrence to the one charged. It is a general rule that evidence of other and distinct

crimes than that charged in the indictment cannot be given in evidence: *State v. Baker*, 23 Or. 441 (32 Pac. 161); *State v. McDaniel*, 39 Or. 172 (65 Pac. 520); *State v. O'Donnell*, 36 Or. 222 (61 Pac. 892); *State v. Lee*, 46 Or. 42 (79 Pac. 577); *State v. Martin*, 47 Or. 284 (83 Pac. 849, 8 Ann. Cas. 769); *State v. Kelliher*, 49 Or. 83 (88 Pac. 867); *State v. Baker*, 50 Or. 386 (92 Pac. 1076, 13 L. R. A. (N. S.) 1040); *State v. Finch*, 54 Or. 488 (103 Pac. 505); *State v. Hembree*, 54 Or. 474 (103 Pac. 1008); *State v. La Rose*, 54 Or. 555 (104 Pac. 299); *State v. Smith*, 55 Or. 408 (106 Pac. 797); *State v. Rader*, 62 Or. 37 (124 Pac. 195); *State v. Start*, 65 Or. 178 (132 Pac. 512); *State v. McAllister*, 67 Or. 480 (136 Pac. 354); *Sykes v. State*, 112 Tenn. 572 (82 S. W. 185, 105 Am. St. Rep. 991); *People v. Mayor*, 80 N. Y. 364; *Shipplly v. People*, 86 N. Y. 375 (40 Am. Rep. 551); *Pinckord v. State*, 13 Tex. App. 468; *Commonwealth v. Shepard*, 1 Allen (Mass.), 575; *Boyd v. United States*, 142 U. S. 450 (35 L. Ed. 1077, 12 Sup. Ct. Rep. 292); *Ogle v. Brooks*, 87 Ind. 600 (44 Am. Rep. 778); *Schaser v. State*, 36 Wis. 429. But to this rule there are certain exceptions, for it has been frequently held that for the purpose of showing motive to commit a crime, to show the intent with which an act was committed, or to show that the act charged in the indictment was committed pursuant to a system of acts of the same character having in view a similar fraudulent result, such testimony can be admitted. This is particularly true in cases of counterfeiting, obtaining money by false pretenses, and setting buildings on fire to defraud insurance companies: *People v. Marrin*, 205 N. Y. 275 (98 N. E. 474, 43 L. R. A. (N. S.) 754), where many cases are collated and commented upon in an exhaustive note to the principal case. In trials for false pretenses the

rule is thus stated in Underhill on Criminal Evidence, Section 438:

“Evidence of similar offenses, involving the making of other false representations, is admissible against the prisoner to show that he was aware of the falsity of the statements made by him in the present instance, and that, knowing them to be false, he made them with the intent to deceive. Evidence of similar false pretenses is particularly relevant when it appears that the fraudulent act for which the accused is on trial does not stand alone, but is a part of a scheme not merely to defraud one individual, but to swindle the community at large.”

See, also, *State v. Germain*, 54 Or. 395 (103 Pac. 521); *State v. Briggs*, 74 Kan. 377 (86 Pac. 447, 10 Ann. Cas. 904, 7 L. R. A. (N. S.) 278), and cases there cited.

The same rule has been applied in cases involving the burning of buildings with intent to defraud the insurance company: 4 Chamberlayne, Ev., § 3225; *Regina v. Gray*, 4 Fost. & F. 1102; *Kramer v. Commonwealth*, 87 Pa. 299; *State v. Huffman*, 69 W. Va. 770 (73 S. E. 292); *State v. Jones*, 171 Mo. 401 (71 S. W. 680, 94 Am. St. Rep. 786); *Knights v. State*, 58 Neb. 225 (78 N. W. 508, 76 Am. St. Rep. 78); *Hinkle v. State*, 174 Ind. 276 (91 N. E. 1090). The circumstances in these cases are various, and there are few of them exactly coincident with those in the case at bar, but from them we may deduce the principle that when the motive or intent of a party constitutes a material part of the offense charged, and particularly where the intent must necessarily be fraudulent in order to constitute the crime, evidence of similar acts may be received to show the intent in the particular case. It is not unusual for a man to insure his property and for a fire thereafter to consume it, but after

a series of insurances and subsequent burnings occurring within a comparatively short period, the average man—and the juryman is supposed to be such—is liable to conclude that the last burning is something more than a coincidence. Take the case at bar: it is at least unusual that a lodger at such boarding-houses as exist in Salem, and whose clothing and worldly effects are contained in two ordinary suitcases, uses the extraordinary precaution of having them insured, and it is a singular coincidence that within a few days a fire should break out in the closet where they are stored and consume them. It is also rather peculiar that the same lodger should between March and October have accumulated \$207 worth of similar articles and taken them in suitcases to another lodging-house and promptly insured them, and that within a little over a week another fire should break out in his vicinity and again destroy his effects. We do not have all the testimony here, and are therefore not informed as to the extent to which this series of insurings and burnings reached.

3. The bill of exceptions is meager, and it appears from it that there was other testimony. While standing alone it might make a landlord reluctant to entertain such a lodger, it would not, perhaps, be sufficient to justify a conviction, but the bill of exceptions does not show that it stood alone, and it may for aught we are able to say from the record be a single link in a chain of occurrences of like character, each of which would strengthen the belief that the burning named in the indictment was not merely coincidental with other insurances and burnings, but occurred in pursuance of a design on the part of the defendant to systematically defraud the insurance companies by insuring his property and burning it. If the evidence

could have upon any theory of the case been admissible, it was the duty of the defendant to have negatived that theory by proper statements in his bill of exceptions. If it was admissible as a link in a chain of such occurrences, it devolved upon him to show by the bill of exceptions that those necessary links were not supplied by other testimony. As we said in *Pacific Laundry Co. v. Pacific Bridge Co.*, 69 Or. 306 (138 Pac. 221), and here repeat:

“A bill of exceptions must point out error * * and make it plain that under no combination of circumstances could the testimony have been admissible.”

The cases of *State v. Start*, 65 Or. 178 (132 Pac. 512), and *State v. McAllister*, 76 Or. 480 (136 Pac. 354), cited by counsel, are not in conflict with the views herein expressed. In *State v. Start*, Mr. Justice BURNETT quotes with approval an excerpt from the case of *State v. O'Donnell*, 36 Or. 222 (61 Pac. 892), which is as follows:

“The rule that evidence of crimes other than that charged in the indictment is inadmissible is subject to a few exceptions, speaking of which Mr. Underhill, in his valuable work on Criminal Evidence (Section 87), says: ‘These exceptions are carefully limited and guarded by the courts, and their number should not be increased.’ ”

Among the exceptions noted by Mr. Underhill is evidence of other offenses to show intent. He states the exception as follows:

“Another exception to the rule occurs when the intention present in an act is material. Thus, suppose the question is: Was a given act, either by the accused, or by some other persons, intentional or accidental? Here it is relevant to prove that the person whose intention is in question had performed acts of a precisely similar nature either before or after the act

intention of which is in question. And if it be found that he has performed many such acts, we have the best of grounds for drawing the conclusion that the act, in the present instance, is intentional and not accidental. So where the commission of an act alleged to be a crime is admitted by the accused; but he denies that he intended to commit it or alleges that he did it without guilty knowledge, his doing similar acts wholly independent and unconnected with that under investigation is relevant to show intention. Evidence of similar and independent crimes (but never those which are dissimilar) is often relevant to show the presence of some specific intent. Thus, evidence of forgeries by the accused has been received to prove the intent to defraud, which is essential in forgery, and of arson or of attempts at arson to prove that a burning was not the result of accident. So, when it is material to show that a given act was done with a fraudulent intention, as, for example, in a prosecution for obtaining goods by false pretenses. Other disconnected false pretenses in which the presence of fraud is recognized may be proved to show the intent. To illustrate, where the accused had used a fraudulent abstract of title to induce one to sell him goods in exchange for real estate it may be shown that the accused had on the same day employed the same means to induce another person to sell him goods": Underhill, Criminal Evidence (2 ed.), Section 89.

In the case of *State v. Start*, 65 Or. 178 (132 Pac. 512), the motive or intent with which the act charged was committed was not material or a necessary ingredient of the offense. Here it is the very gist of the crime, and herein lies the distinction between the two cases.

The judgment of the Circuit Court is affirmed.

AFFIRMED.

MR. CHIEF JUSTICE MOORE, MR. JUSTICE BURNETT
and MR. JUSTICE BEAN concur.

MR. JUSTICE BENSON not sitting.

Argued September 18, affirmed October 10, 1916.

KOSCIOLEK v. PORTLAND RY., L. & P. CO.*

(160 Pac. 132.)

Death—Husband and Wife—Loss of Consortium—Wife's Right of Action.

1. At common law, the husband could maintain an action for injury to or death of his wife, whereby he lost her services or consortium; but the wife herself could not maintain a corresponding action to recover for the loss of services and consortium due from the husband to her.

Death—Husband and Wife—Statutes.

2. Section 7050, L. O. L., which repeals all laws imposing or recognizing civil disabilities upon a wife which are not imposed or recognized as existing against the husband, does not confer on a wife any new right of action, but merely allows her to act independently of her husband for the redress in the courts for the infringement of rights which she already had.

Choses in Action—Common Law—Statutes.

3. Choses in action exist only by virtue of the common law or statute; thus, a claim for the loss of the society or assistance of a husband cannot be enforced by either a wife or widow, unless created by statute.

Civil Rights—Natural Rights—Husband and Wife.

4. The natural rights of a person at common law are those of personal security in the legal enjoyment of life, limb, body, health and reputation, the right of personal liberty, and the right of private property, and do not include rights growing out of the marriage relation, as, for instance, consortium, since those are based on social customs.

Husband and Wife—Actionable Interference With Marital Rights.

5. Marital rights are invaded, giving rise to a right of action in husband or wife, whenever a third person, through machination, enticement, seduction or other wrongful, intentional or malicious interference with the marital relation deprives the husband or wife of the consortium of the other; but a negligent wrong to the husband does not furnish a cause of action in favor of the other spouse unless by special legislative action.

Death—Death of Husband—Wife's Right of Action.

6. Where a husband suffered personal injuries through the negligence of another, sued therefor and compromised, his widow, after his death, had no right of action for the consequential injury to her through loss of consortium and support; there being no statute giving the widow such a right of action.

*As to right of husband or wife at common law to recover for loss of services or consortium, against a person negligently causing the death of the other, see notes in 19 L. R. A. (N. S.) 633; 24 L. R. A. (N. S.) 1042; 33 L. R. A. (N. S.) 1042. REPORTER.

From Multnomah: ROBERT G. MORROW, Judge.

Department 1. Statement by MR. JUSTICE BURNETT.

The plaintiff, Katherine Kosciolek, widow of John Kosciolek, complains that the defendant, Portland Railway, Light & Power Company, negligently ran one of its street-cars against a wagon being driven on the street into Portland by her husband, whereby without his fault he was injured so that he died about 13 months later. She says that:

“By reason of the matters and things herein alleged this plaintiff has been, now is, and will hereafter be deprived of the comfort, society, love, affection, association, companionship and support of the said John Kosciolek; that prior to said injuries the said John Kosciolek was a kind, affectionate and devoted husband and father, but after receiving such injuries he became nervous, cross, irritable, sick and childish and was so up to the time of his death; that such condition arose shortly after his injury, and was of a permanent and progressive character, and existed at the time of his death”; and “that by reason of the matters and things herein set forth, this plaintiff has been injured to her damage in the sum of \$20,000.”

The defendant denied everything in the complaint except its own corporate existence and that it was operating a street-car system in Portland. It charges that the decedent was guilty of contributory negligence, in that he drove his team upon the track directly in front of the defendant's car so suddenly that it was impossible to avoid a collision. Another defense was that the decedent himself during his lifetime sued this defendant for damages for the same injuries growing out of the identical accident described in plaintiff's complaint, and that after issue joined and the action was ready for trial, this defendant, as a compromise thereof, paid to the said John Kosciolek, in full satis-

faction of all claims and demands on account of said accident, the sum of \$850, in consideration of which Kosciolek executed and delivered to defendant a release on behalf of himself, his heirs, executors and administrators, forever discharging the defendant, its successors, and assigns from all liability by reason of the injury and from all claims or causes of action on account thereof. The first defense is traversed by the reply. As to the release the reply admits the institution of the action between the plaintiff's husband and the defendant and the execution of the acquittance. It is not denied that the defendant paid to Kosciolek the sum of money mentioned in the answer as a compromise of the action. In brief the contention of the reply is that the injuries mentioned in the release were not those of which the plaintiff here complains. It was also urged in the reply that the effect of the release was an admission on the part of the defendant of its liability for all injuries growing out of the negligence of the defendant in the instance described. A jury trial resulted in a verdict for the defendant, and the plaintiff appealed. **AFFIRMED.**

For appellant there was an oral argument by *Mr. Isham N. Smith*, with a brief over the names of *Messrs. Littlefield & Smith* to this effect:

1. The plaintiff requested an instruction that the effect of the payment to deceased in settlement of his pending action was an admission by the defendant of negligence, and settled the element of liability, which was refused. This was error: *Weiss v. Kohlhagen*, 58 Or. 144, 153 (113 Pac. 46); *City of Newport News v. Porter*, 122 Fed. 321; *Grimes v. Keene*, 52 N. H. 330; *Chicago, R. I. & P. R. Co. v. Rhodes*, 21 Colo. App. 229 (121 Pac. 769); *G. H. & S. A. Ry. Co. v. Hert-*

zig, 3 Tex. Civ. App. 296 (22 S. W. 1013); *T. & N. O. R. Co. v. C. W. A. Co.*, 137 S. W. 401; *Benson v. Hall*, 83 N. E. 1036; *Watson v. Bigelow*, 58 Atl. 741.

The accord and satisfaction having been completed between John Kosciolk and the company, neither he nor it could reopen or relitigate any of the matters thereby settled: *Hurrle Gas Co. v. Hooker Co.*, 120 Ill. App. 433; *Hemingway v. Stansell*, 106 U. S. 339; 1 Corpus Juris, 354, par. 2.

2. The settlement with Kosciolk was not a bar to this action by his widow: *Clark v. Dinsmore*, 5 N. H. 136; *Tate v. Wabash Ry. Co.*, 141 S. W. 459; *Spokane & I. Ry. Co. v. Whitley*, 237 U. S. 487; *Mageau v. Great Northern Ry. Co.* (Minn.), 115 N. W. 651 (15 L. R. A. (N. S.) 511).

3. The injuries to John Kosciolk did personal injury to him and also did damage to the relation between him and his wife, for which she can sue. In Oregon, married women are liberated from all disabilities of the common law, and enjoy all civil rights equally with men: Section 7050, L. O. L. Under this section a married woman in Oregon can maintain an action for alienating her husband's affections: *Keen v. Keen*, 49 Or. 362 (90 Pac. 147, 10 L. R. A. (N. S.) 504); *McCann v. Burns*, 73 Or. 167 (143 Pac. 1099).

4. Modern authorities are to the effect that either spouse may sue for an invasion of the marital relationship resulting in alienation of affection or loss of consortium. The elements involved are, affection, society, mutual obligations for support, conjugal relation, with advice and assistance in rearing the family. Accordingly, it is now the recognized law that either spouse may maintain an action for damages to the marital relation: *Williamson v. Osenton*, 34 Sup. Ct. Rep. 442, alienation of affection; *Flandemeyer v.*

Cooper, 85 Ohio St. 327 (98 N. E. 102, Ann. Cas. 1913A, 983, 40 L. R. A. (N. S.) 360, 364), sale of drugs rendering husband insane; *Holleman v. Harvard*, 119 N. C. 150 (56 Am. St. Rep. 672), selling drugs to wife, incapacitating her; *Kelley v. New York, N. H. & H. R. Co.*, 168 Mass. 308 (46 N. E. 1063, 60 Am. St. Rep. 397, 38 L. R. A. 631); *Stonka v. Kreitle*, 92 N. W. 1042, sale of intoxicating liquors; *Tatro v. Railway Co.*, 141 S. W. 459; *O'Gorman v. Pfeiffer*, 130 N. Y. 577.

5. A culpable injury to either spouse gives rise to a cause of action not only to the injured person directly, but as well to the other spouse for the injury to the consortium: *Mageau v. Great Northern Ry. Co.*, 115 N. W. 651 (15 L. R. A. (N. S.) 511); *Kimberly v. Howland*, 143 N. C. 396 (7 L. R. A. (N. S.) 545); *Ladaire v. Minneapolis & St. L. Ry. Co.*, 130 N. W. 8; *Omaha & M. Ry. Co. v. Cosby*, 7 N. E. 378.

For respondent there was a brief over the names of *Messrs. Griffith, Leiter & Allen* and *Mr. Frank J. Lonergan*, with an oral argument by *Mr. Lonergan*.

MR. JUSTICE BURNETT delivered the opinion of the court.

1. Many questions are suggested in the plaintiff's brief which are unnecessary to consider. The whole question hinges upon the determination of whether or not a widow can maintain an action for loss of consortium incident to the marriage relation between herself and her deceased husband. It may be set down that at common law, while the husband could maintain an action for an injury to or death of the wife whereby he lost her services and consortium, yet the wife herself could not maintain a corresponding action to recover

for the loss of services and consortium due from the husband to herself.

2. The position of the plaintiff, however, is that since the enactment of Section 7050, L. O. L., a wife has rights and remedies equivalent in all respects to those with which the husband is endowed. That statute reads thus:

“All laws which impose or recognize civil disabilities upon a wife which are not imposed or recognized as existing as to the husband are hereby repealed; provided, that this act shall not confer the right to vote or hold office upon the wife, except as is otherwise provided by law; and for any unjust usurpation of her property or natural rights she shall have the same right to appeal in her own name alone to the courts of law or equity for redress that the husband has.”

This section does not confer upon the wife any new right of action. It only allows her admission to the courts as a suitor independent of her husband for the purpose of redressing the infringement of rights which she already had.

3. It is only by virtue of statutes that anyone has a chose in action not known to common law. If our legislation gave the widow a right to recover for the death of her husband, or a wife to recover for injury to her spouse, she would be a competent suitor under this section to institute an action for damages for the violation of her statutory right, but no enactment exists giving her that privilege.

4. The natural rights of a person at common law are the right of personal security in the legal enjoyment of life, limb, body, health and reputation, the right of personal liberty, and the right of private property: 1 Bl. Com. 129. It is said in Black's Law Dictionary, page 1038:

“Natural rights are those which grow out of the nature of man and depend upon personality as distinguished from such as are created by law and depend upon civilized society, or they are those which are plainly assured by natural law.”

These words of the statute refer to those privileges which a feme sole possesses in common with any other individual, and the only effect of the enactment is to allow a married woman to litigate in her own name independent of her husband when these rights have been violated. It cannot be said that the marriage relation gives rise to natural rights in the sense designated by the common-law writers, for that relation grows out of the customs of society, and is more or less conventional.

5. The authorities cited by the plaintiff are instances either where the husband is suing for an injury to his wife, thus enforcing his common-law right, or where there is a direct attack upon the marriage relation itself, as for the alienation of the husband's affection and the like. The latter cases depend upon the fact that there is a direct and intentional interference with the marriage relation. As said in *Flandermeyer v. Cooper*, 85 Ohio St. 327 (98 N. E. 102, Ann. Cas. 1913A, 983, 40 L. R. A. (N. S.) 360, 364):

“This right is invaded whenever a third person through machination, enticement, seduction or other wrongful, intentional, and malicious interference with the marriage relation deprives the husband or wife of the consortium of the other.”

There the attack upon the marriage relation is direct, with purpose and malice. The harm to the wife is immediate and not merely consequential or secondary, and the law visits punitive damages in her favor upon the wrongdoer. A negligent injury to the husband, however, affects the wife or widow only indi-

rectly or collaterally, calling for mere compensatory damages which the husband while living, or his personal representatives after his death, may collect, thus settling the grievance once for all. This distinction runs throughout the authorities, and is ground for holding that a mere negligent wrong to the husband does not furnish cause of action to a woman in her character either as wife or widow. The injury to her in such conditions is not the direct, natural, and necessary consequence of the carelessness of the defendant. For what he suffered during his life the husband had an action directly against the defendant.

6. It is through her spouse that the plaintiff claims in the present instance; but, while he had control of the situation, he released his cause of action, and, the source of her claim thus having been taken away, she has no standing to demand more. After the death of an individual by the wrongful act of another, the statute gives a cause of action to his personal representatives under Section 380, L. O. L. Many persons, such as minor children and dependent relatives, besides the wife, might be more or less indirectly affected by injury rendering the husband or father less capable to continue his duty of support. The wife stands in no better plight than any of the others mentioned. Section 380 affords relief to her in common with the others, and it would be unreasonable to hold that the defendant, after fairly compensating the injured man for the negligent wrong inflicted upon him, should be compelled to search out all others of his relatives and litigate or settle with them.

It is unnecessary to decide whether the husband could bring such an action as this or not where his wife was injured or slain. It is sufficient to say that there is no statute so equipping the wife or widow.

The complaint did not state a cause of action against the defendant. Much instruction on this subject may be derived from the perusal of the following cases: *Feneff v. New York Cent. & H. R. Ry. Co.*, 203 Mass. 278 (89 N. E. 436, 133 Am. St. Rep. 291, 24 L. R. A. (N. S.) 1024); *Brown v. Kistelman*, 177 Ind. 692 (98 N. E. 631, 40 L. R. A. (N. S.) 236); *Goldman v. Cohen*, 30 Misc. Rep. 336 (63 N. Y. Supp. 459); *Stout v. Kansas City Terminal Ry. Co.*, 172 Mo. App. 113 (157 S. W. 1019); *Gambino v. Manufacturers' Coal & Coke Co.*, 175 Mo. App. 653 (158 S. W. 77); *Patelski v. Snyder*, 179 Ill. App. 24; *Marri v. Stanford St. Ry. Co.*, 84 Conn. 9 (78 Atl. 582, Ann. Cas. 1912B, 1120, 33 L. R. A. (N. S.) 1042).

The judgment is affirmed.

AFFIRMED.

MR. CHIEF JUSTICE MOORE, MR. JUSTICE BENSON and
MR. JUSTICE HARRIS concur.

Argued July 14, affirmed September 19, rehearing denied October 17,
1916.

ELWERT v. KNAPP.

(159 Pac. 1027.)

Judgment—Conclusiveness—Title to Property.

1. It having in a suit between E. and R. been finally decreed that R. was owner of certain land, which he claimed as successor to E.'s vendee, and that E. had no interest therein, E. is estopped, in a suit to enjoin defendant city from paying R. the purchase price thereof, whether suing as claimant to the property or as taxpayer, to assert that R., or the city as his grantee, has no title to the property.

[As to elements necessary to conclusiveness of judgment in another action, see note in 8 Am. St. Rep. 229.]

From Multnomah: GEORGE N. DAVIS, Judge.

Department 1. Statement by MR. JUSTICE McBRIDE.

This is a suit by Carrie M. Elwert, as a taxpayer of the City of Portland, against F. C. Knapp, substituted for F. W. Mulkey, Ben Selling, John H. Burgard, Charles B. Moores, Dan Kellaher, as Dock Commissioners of the City of Portland, and the City of Portland, a municipal corporation, to restrain the city from paying the sum of \$40,000 to William Reid as the purchase price of the following described property:

“Beginning at a point on the north line of East Washington Street 100 feet west of the west line of Water Street, and running thence westerly along the north line of East Washington Street to the low-water mark of the Willamette River, a distance of about 159 feet more or less; thence northerly along the low-water mark of the Willamette River to a point 50 feet north of the point of beginning; thence east 159 feet more or less to a point 100 feet west of the west line of Water Street; thence south 50 feet to the point of beginning, together with the right to wharf out to the established harbor line of the Willamette River.”

It is alleged that Reid has no title to said property, that the payment of any money therefor will be a waste of the funds of the city, and impose a great and unnecessary burden upon the taxpayers, and that plaintiff is a large taxpayer and will be especially damaged thereby.

The defendants answered by a general denial of the allegations of the complaint respecting the lack of title in Reid, and alleged that the commission had purchased of him all of blocks 1 and 2, as shown on the plat of East Portland, which former municipality is now included in the City of Portland, and that, there being some question raised as to the validity of Reid's title to the south 50 feet of block 2 and the water and

wharfage rights adjoining and appurtenant thereto, the commission had by agreement with Reid withheld payment of the sum of \$40,000 of said purchase price until it should be ascertained that neither the plaintiff nor the heirs of Arthur H. Johnson, deceased, had any estate or interest in said property; that a suit is now pending between the City of Portland and the heirs of said Arthur H. Johnson for the purpose of settling such claims as they may have, if any, in said property; that defendants do not intend to pay said sum of money until final adjudication of the alleged claims of said heirs shall have been had in such court. The defendants by way of cross-complaint allege:

“That defendant City of Portland is the owner in fee simple and in possession of the property described as beginning at a point on the north line of East Washington Street 100 feet west of the west line of Water Street, and running thence westerly along the north line of East Washington Street to the low-water mark of the Willamette River; thence northerly along the low-water mark of the Willamette River to a point 50 feet north of the south line of block 2 in East Portland, according to the duly recorded plat thereof, situate in the corporate limits of the City of Portland, county of Multnomah, State of Oregon, said distance being measured at right angles to said south line; thence east parallel with the south line of said block 2 to a point 100 feet west of the west line of East Water Street measured at right angles to said west line; thence south 50 feet to the place of beginning—together with the right to wharf out to the established harbor line of the Willamette River and also all river, water and wharf rights, and all other rights appertaining or appurtenant to said property; that said property embraces a part of block 2 in said East Portland, all of which is owned by and in the possession of said City of Portland, together with all the river, water and wharf rights and privileges adjacent or appurtenant thereto, and all other rights thereunto

belonging or appertaining; that plaintiff claims some right, title or interest in or to said property or some part thereof, the exact nature and extent of which is to plaintiff unknown, but whatever the same may be the same is wrongful.”

Then follows a prayer that plaintiff's suit be dismissed; that defendants' title to the premises be declared valid and quieted; and that plaintiff be enjoined from asserting any estate, right, or interest therein. The plaintiff answered claiming title in herself by mesne conveyances from James B. Stephens, the original grantee of the United States, and his successors, and by way of separate reply alleged:

“That on the nineteenth day of May, 1909, one M. W. Parelius, without right or title to any real estate described in the deed except lot 5, block 2 of East Portland, executed a pretended deed attempting to convey to one William Reid lot 5, block 2, together with the premises beginning at the high-water mark of the Willamette River on the western prolongation of the north line of East Washington Street, and running thence westerly to the United States harbor line of the Willamette River; thence northerly along the harbor line 50 feet; thence east to the high-water mark of the Willamette River; thence south 50 feet to the point of beginning—which paper is recorded in Book 455, on page 284, Deed Records of Multnomah County, Oregon; that on the tenth day of April, 1865, one James B. Stephens filed a plat of the City of East Portland in the office of the county clerk of Multnomah County, Oregon, which plat is recorded in Book F, on page 116, and said plat is the plat referred to in the deed alleged to have been executed by said William Reid to the City of Portland, and said plat shows block 2 and a scale of distance is set forth on said plat, and no lots are numbered on the blocks of said plat, but a key block is also set forth upon said plat showing the manner and extent of numbering the lots contained in a block, and that said scale and said

key block show that block 2 is 160 feet on the south side of said block and 116 feet on the north side of said block and 200 feet on the east side of said block, and that lots are 100 feet east and west and 50 feet north and south, except such lots as are contained in fractional blocks, in which case lots 1, 2, 3 and 4 are 50 feet from the north line to the south line and such distance from the east line to the west line as there is distance between a point 100 feet west of the east line of said fractional blocks and the western boundary of said fractional blocks, as shown on said plat, in accordance with the scale shown on said plat; that said premises described in the complaint according to the said plat of East Portland would be designated and described as lot 4, block 2, of East Portland; that the Willamette River is a tidal stream, and the ordinary tide is $2\frac{1}{2}$ feet above low water, and the ordinary low water of the Willamette River is zero, and said zero is .96 of a foot above mean sea level at Astoria, and mean sea level at Astoria is 4 feet above mean low water at Astoria, and ordinary high water of the Willamette River is 3 feet above zero; that at the time of the execution of said deed by said Parelus to said William Reid May 19, 1909, the elevation of the west line of lot 5 was 12.4 feet above said zero, and the elevation of the western line of block 2, as shown by the plat, between the south line thereof and a line 50 feet north of said south line, was 8.1 feet, and ever since have been and now are the same elevations as aforesaid, and the water line at zero stage of the river is 195.5 feet west of the west line of lot 5, block 2, and that the water line on May 19, 1909, was, ever since has been, and now is the following distances west of the west line of lot 5, to wit: At 1 foot above zero, 126 feet; at 2 feet above zero, 113.7 feet; at 3 feet above zero, 102 feet; at 4 feet above zero, 92.5 feet."

The defendants filed a supplemental answer setting up the fact that since the original answer the suit begun by the plaintiff against the heirs of A. H. Johnson had terminated in a decree adjudging that the

City of Portland was the owner of the property in dispute and forever quieting its title thereto.

It was also alleged as a bar to plaintiff's claim in this suit and as ground for affirmative relief that in the case of *Carrie M. Elwert v. William Reid*, 70 Or. 318 (139 Pac. 918, 141 Pac. 540), which was finally decided in this court on the ninth day of May, 1914, it was adjudged and decreed that Carrie M. Elwert had no right, title or interest in lot 5 of block 2, and that the premises lying west of lot 5, and between it and the harbor line of the Willamette River, are pertinent to lot 5; that said William Reid, the predecessor in title of defendant City of Portland, was the owner of the exclusive right of wharfage and possession in and to the same, and that Carrie M. Elwert has no right, title or interest in and to said real property or any part of said right of wharfage; that her claims thereto were null and void, and that she was by said decree enjoined and restrained from asserting any right to said property; that in May, 1915, Reid relinquished to the city the right to maintain a water-pipe across said premises and removed the pipe, and that his alleged easement across said premises had thereby become extinguished; that about July 7th M. W. Parelus and wife released and quitclaimed to the City of Portland all their interest in said property. By stipulation filed it was agreed that the matter in the supplemental answer should be treated as denied so far as it affected any right of plaintiff.

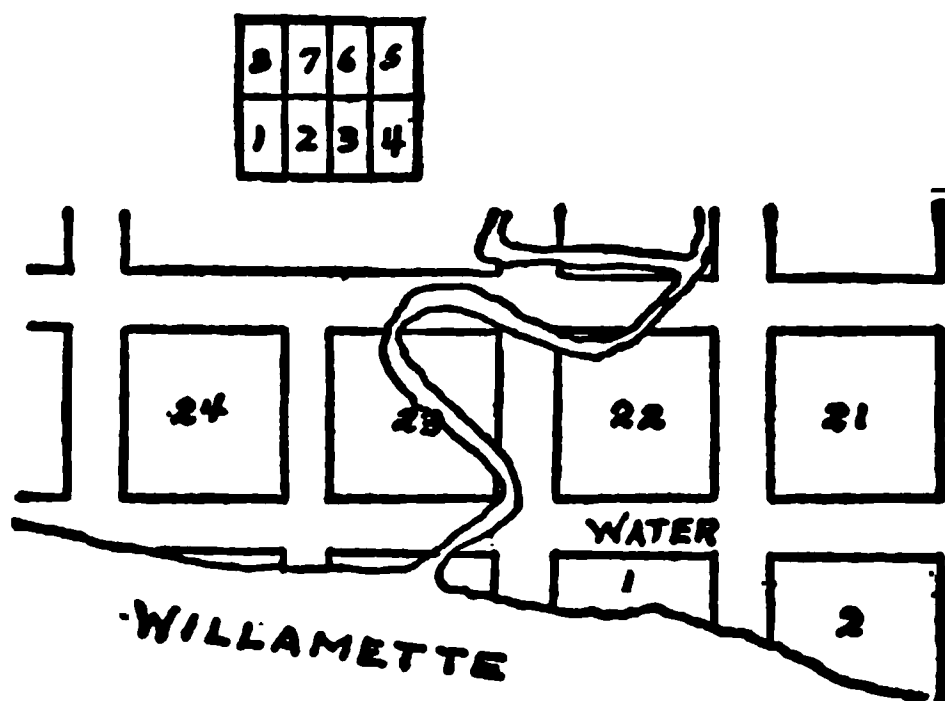
There was a trial and findings and decree for defendants, and plaintiff appeals. **AFFIRMED.**

For appellant there was a brief over the names of *Mr. George S. Shepherd* and *Mr. W. W. McCredie*, with an oral argument by *Mr. Shepherd*.

For respondents there was a brief over the names of *Mr. Henry A. Davie*, *Mr. Walter P. La Roche*, *Mr. Lyman E. Latourette*, and *Messrs. Boothe & Richardson*, with oral arguments by *Mr. J. F. Boothe* and *Mr. Davie*.

MR. JUSTICE McBRIDE delivered the opinion of the court.

The decision of this case depends upon the construction of certain conveyances and adjudications of the Circuit Court of Multnomah County and of this court, which when analyzed indicate to our minds that plaintiff has no standing here. As before stated, the original title to the land lying adjacent to the Willamette River on the east side thereof was in James B. Stephens. On December 28, 1861, Stephens filed a plat of the then City of East Portland, in which that part relating to the property in controversy is as follows:



The map did not indicate the subdivision into lots and blocks, but a legend and scale which is shown above on the accompanying diagram indicated that complete blocks were approximately 200 feet square, and that these were subdivided into lots 50 feet north

and south by 100 feet east and west. If there existed land upon which the plat could take effect, there would be upon the southerly side of block 2 a complete lot 5 and a fractional lot 4; all depending upon where the line of ordinary high water was at the time the plat was filed. The contention as to whether the alleged lot 4 was below the line of ordinary high water, and therefore not included in the Stephens' donation claim, was first litigated in the case of *Johnson v. Knott*, 13 Or. 308 (10 Pac. 418). It appeared in that case that Stephens had conveyed to Knott's grantors lot 5 in block 2, and the respondents, who owned and operated a ferry at the foot of L Street, now East Washington Street, which is immediately south of block 2, drove piling in front of the alleged lots 3 and 4, block 2, in order to sheer their ferryboat into the slip at L Street. Subsequent to his conveyance to Knott's grantors, and in 1874, Stephens had conveyed the alleged lots 3 and 4, in block 2, with other realty, to A. H. Johnson, who brought an action against him to recover the possession of the alleged lots. Under instruction of the court, which substantially submitted the question of the right of Stephens to include these lots in his plat, the jury returned a verdict for the defendant Knott, but there were other issues involved which would have justified the verdict even if the evidence had shown that the whole or part of lot 4 was not a part of the shores and waters of the Willamette River. The judgment of the court was that the plaintiff, Johnson, was not entitled to the possession of the property, and, this judgment having been affirmed, we hear of no further contention of Johnson in regard to it; he seemingly having acquiesced in the theory that the property formed part of the banks and bed of the river, and that Stephens had no title thereto. If

this were actually the case, the act of 1874 granting overflowed lands upon the Willamette River to the adjoining bank owner operated to vest the title to the alleged lot 4 in Knott, whose title to lot 5 was indisputable; but it is not clear that the jury found, or intended to find, or that there is necessarily included in their verdict a finding, that lot 4 did not exist, and the evidence here tends to show that a portion thereof was above ordinary high water, and in that event the act of 1874 inured to the benefit of Johnson. But whether it is the successors of Knott or the heirs of Johnson who succeeded to the title to lot 4 is immaterial here in view of subsequent conveyances and decrees, as we will presently show. On June 24, 1891, the heirs of Levi Knott mortgaged lot 5 and appurtenances to J. B. Elwert, the mother of plaintiff, and on foreclosure the property was sold to this plaintiff, who received a sheriff's deed March 1, 1896. On October 21, 1905, Carrie M. Elwert entered into a written agreement with H. P. Palmer, whereby she agreed to sell and convey to him lot 5, in block 2, together with all riparian rights thereto for \$3,000. The agreement provided that Palmer might in the name of Carrie M. Elwert prosecute and control any necessary suits to quiet title to the premises, and that "all lands, rights and privileges owned or claimed by said Carrie M. Elwert between Water Street and the Willamette River is also to be conveyed by Carrie M. Elwert to H. P. Palmer." On the theory that the west line of the Stephens donation claim was east of lot 4 and upon lot 5, a conveyance of lot 5 and the appurtenances and riparian rights would include all of the alleged lot 4; but, evidently to make assurance doubly sure, the contract contained also a description which included all of lot 4, so that Palmer became by this contract the

equitable owner of lot 5 and of whatever interest Carrie M. Elwert had in the property between that and the river. The contract was immediately assigned by Palmer to M. W. Parelus, who, in fact, was the real principal in the transaction. On the 26th of October, 1905, Carrie M. Elwert, pursuant to her contract with Palmer, commenced a suit to quiet title to lot 5 and the property included in lot 4, not describing it as a lot, but by metes and bounds; the defendants being P. H. Marley, H. E. Noble and J. Olson, who in their answer disclaimed any title to lot 5, but claimed title to the alleged lot 4 by virtue of a sale for delinquent street assessments and by a sheriff's sale for delinquent taxes, describing said lot as such as well as by metes and bounds. After this disclaimer by Marley and others of title to lot 5, Carrie M. Elwert, in August, 1906, conveyed to Parelus lot 5, with the appurtenances. The suit continued as to the residue of the property. The plaintiff, Elwert, in her reply to the answer of Marley, and others, denied that any such lot as the alleged lot 4 existed, pleading the case of *Johnson v. Knott*, 13 Or. 308 (10 Pac. 418), to that effect, and alleged that defendants Marley and others, as successors to Johnson by certain tax deeds, were estopped to assert the existence of lot 4, in substance claiming the wharfage and riparian rights on the Willamette River west of lot 5 as appurtenant to that lot. On December 24, 1906, a decree was entered that Carrie M. Elwert is the owner in fee of the property described as commencing at the southeast corner of block 2, East Portland; thence west along the north line of East Washington Street to the Willamette River; thence north down said river 50 feet; thence east and parallel with said north line of East Washington Street to the east

line of said block 2; thence south to the place of beginning—together with the exclusive right of wharfage from said land out to the navigable waters of said river, and is the owner of said right of wharfage in, to and upon those premises lying below ordinary high-water mark of the Willamette River fronting and abutting upon said lot 5, block 2, East Portland, out to the established harbor line of said river, and is entitled to the undisturbed and immediate possession thereof; that the chief of police's and sheriff's deeds referred to in the answer are null and void; and that the defendants be enjoined from claiming or asserting any right, title or interest in or to said property. On May 19, 1909, a mandate from the Supreme Court was entered dismissing an appeal and affirming the foregoing decree. On October 23, 1906, H. P. Palmer and wife made a quitclaim deed to M. W. Parelus of the property described as commencing at the southeast corner of block 2 in East Portland, and running thence westerly along the north line of East Washington Street to the Willamette River; thence down said river 50 feet; thence east parallel with the north line of East Washington Street to the east line of said block 2; thence south along the east line of said block 2 to the place of beginning, being fractional lot 5 of said block 2 in East Portland—together with the exclusive right of wharfage from said land and out to the navigable waters of the Willamette River. On May 19, 1909, M. W. Parelus and wife conveyed to William Reid all of lot 5, block 2, in East Portland, and all riparian rights and right of wharfage in and to that portion of the bank of the Willamette River fronting on said lot 5 described as beginning at a point in the north side of East Washington Street where the same is intersected by the high-water line of the Willamette

River; thence west along the westerly prolongation of the north line of said East Washington Street to the harbor line established by the United States; thence northerly along said harbor line to a point west of a point 50 feet north of the place of beginning; thence east to the high-water mark of the Willamette River; thence along said high-water mark to the place of beginning. Under the terms of her contract with Palmer it was the duty of Carrie M. Elwert at once to convey the apparent title thus obtained by this decree to Parelius, his assignee, who by the terms of his contract and the payment of the purchase price was already the equitable owner of the property recovered; but, true to her character as a perennial litigant, which the records of this court abundantly establish, she sought to collect for herself the costs and disbursements of the suit and to appropriate them to her own use, and Parelius was compelled to again go into court and set up his contract and enjoin her from so doing. The court found with the plaintiff. Upon August 5, 1909, J. B. Elwert, plaintiff's mother, began a suit against William Reid and M. W. Parelius to quiet title to the property obtained by the decree in *Elwert v. Marley et al.*, alleging that Carrie M. Elwert held the property in trust for her, and had no right to convey it. This suit, being decided adversely to plaintiff, was appealed to this court. Mrs. J. B. Elwert having died pending the appeal, Carrie and her brother C. P. Elwert were substituted as plaintiffs; and we have Carrie M. Elwert as a substituted plaintiff prosecuting a suit to have Carrie M. Elwert, alleged trustee, declared guilty of a gross breach of trust, and demanding that the transaction involved therein be set aside. The result of this appeal to the Supreme Court was a decree for the defendants affirming the decree of the Circuit Court, which decree was as follows:

“This cause coming on to be heard upon the motion of the defendants for a decree in accordance with the findings of fact heretofore made and filed herein by the court, and it appearing that the court has heretofore made its findings of fact and conclusions of law in this suit, which are now on file herein, said motion is allowed. It is therefore ordered, adjudged and decreed that defendant William Reid is the owner in fee simple of lot 5 in block 2 in East Portland, Multnomah County, according to the duly recorded map and plat thereof; that ordinary high-water mark in the Willamette River is entirely within the boundaries of said lot 5 for the whole width thereof; that the premises lying west of said lot 5 and between it and the harbor line in the Willamette River are appurtenant to the said lot 5, and that defendant William Reid is the owner of an exclusive right of wharfage and possession in and of the same; that plaintiff has no right, title or interest in or to any part of said real property or in or to any part of said right of wharfage and possession, and that her claims thereto are null, void and of no effect; and that she and all persons claiming or to claim by, through, or under her be and they hereby are perpetually and forever enjoined and restrained from claiming any right, title or interest in or to said premises or in or to said right of wharfage and possession and from interfering in any way with the possession and right of possession of defendant William Reid therein and thereto. It is further ordered and decreed that the plaintiff's complaint be and the same hereby is dismissed, and that the defendants recover their costs and disbursements herein from the plaintiff, taxed at \$95.”

The decree settled all claims of Carrie M. Elwert to the property here in dispute, and, so far as she is concerned, whether suing as a claimant to the property or as a taxpayer, or in any other character, she is estopped from asserting that William Reid, or his grantee, the City of Portland, has no title to the property.

It is evident that the title to the disputed premises was either in the Elwerts or in the heirs of Johnson, and it appears that the city has brought suit to quiet title against the heirs of Johnson, and that they have defaulted. It is evident that Reid's claims upon the property were such that it would have been impolitic for the city to have purchased the other property without acquiring them; and we are satisfied that by acquiring them it extinguished the last vestige of adverse title, insomuch as it appears here that its title to any possible claim by the heirs of Johnson has been extinguished and quieted by the suit brought by it for that purpose against the heirs of Johnson.

The decree of the Circuit Court is therefore affirmed.

AFFIRMED. REHEARING DENIED.

MR. CHIEF JUSTICE MOORE, MR. JUSTICE BENSON and MR. JUSTICE BEAN CONCUR.

Argued September 20, affirmed October 17, 1916.

STATE v. FINNIGAN.

(160 Pac. 370.)

Escheat—Pleading—Issues—Adjudication of County Court.

1. In an escheat proceeding, where the state claimed personalty of deceased as well as the realty, and answering defendants pleaded an adjudication of the County Court, which, when proved, would utterly defeat the claim of the state as to the personalty and the state replied by denying that the County Court had made the adjudication, proof that the County Court made the order would prevent the personalty from being forfeited to the state, and it was therefore competent to introduce findings and order of the County Court.

Appeal and Error—Review—Harmless Error—Admission of Evidence—Facts Admitted.

2. Although the trial court might have considered an oral statement of counsel as a waiver of the state's claim to the personalty, as the state did not in unequivocal terms admit the fact to be that the County Court had ordered a distribution of the personal property

to persons whom that court had found were the heirs of the deceased, and since proof of the fact would establish the claims of the defendant and defeat the claim of the state, the admission of evidence of the order made by the County Court was not prejudicial error.

Escheat—Pleading—Issues—Adjudication of County Court.

3. As the state's claim to the personalty made it necessary for the defendants to plead the order of distribution, a binding disclaimer by the state did not of its own force render incompetent the order and findings of the County Court.

Trial—Evidence—Admissibility for Particular Purpose.

4. Where the order of the County Court was inadmissible to prove heirship to the realty, but was nevertheless competent to prove ownership of the personalty of deceased, its incompetency for one purpose did not destroy or affect its competency for the other.

Trial—Instructions—Requests.

5. Although refusal of an instruction limiting the evidence to the single issue as to personalty would be an error, no error can be predicated upon the court's failure in that respect, in the absence of a request.

Escheat—Trial—Instructions.

6. An instruction, that the fact for the jury to determine was whether deceased at the time of his death died without any heir, and that so far as the particular case was concerned before the jury could determine he died leaving heirs they would have to find that some of the parties set up in the answer were his heirs, was not improper as requiring the state to prove that the deceased left no heirs.

[As to presumptions and burden of proof in proceedings to establish escheat, see note in Ann. Cas. 1913E, 383.]

From Washington County: JAMES U. CAMPBELL,
Judge.

Department 1. Statement by MR. JUSTICE HARRIS.

The State of Oregon is attempting to escheat to it the property owned by James McNulty, who died intestate in April, 1907, leaving real and personal property. The County Court appointed William T. Finnigan as administrator. After paying all the claims against the estate, the administrator filed his final account showing real property undisposed of and cash on hand amounting to \$1,023.26. Notice was duly given of the time fixed for hearing the final account. Petitions for the distribution of the cash were filed by

different persons who claimed to be heirs of the deceased. The contesting claimants of the estate submitted evidence upon the hearing of the final account and petitions, and then the County Court, on December 27, 1910, made findings of fact and conclusions of law that John McNulty, Kate McNicholas and Mary McAndrews are first cousins of the deceased and his only heirs at law, and ordered the cash to be paid to them.

The escheat proceeding was commenced on January 12, 1911, against the administrator, the Shute Savings Bank, and 24 persons who claim to be heirs of the deceased. Among the averments of the information are allegations that James McNulty left real and personal property, and that he died intestate "without heirs at law or next of kin, and said real and personal property so belonging to said estate should be escheated to the State of Oregon"; that all the defendants, except the administrator and the Shute Savings Bank, have falsely represented themselves as heirs of the deceased and have filed petitions with the County Court asking that the estate be distributed to them; that "it is desired and necessary to have delivered the personal property of said estate of James McNulty, deceased, now in the hands of the administrator, over to the proper persons authorized by law and by this court to take possession of said personal property now in the hands of William T. Finnigan, as administrator"; and that it is for the best interest of the estate that a receiver be appointed to take charge of the personal and real property. The information concludes with a prayer which in part asks that the court adjudge the "real and personal property to be the property of the State of Oregon," and that the administrator be dispossessed "of said real and personal property."

The administrator and the Shute Savings Bank filed separate answers, Mary McAndrews and Kate McNicholas joined in an answer, and Thomas McNulty with nine others filed a joint answer. All the appearing defendants, except the bank, pleaded the order of distribution made by the County Court, for the purpose of defending against the claim which the state makes to the personal property.

The replies traverse the allegations concerning the order of distribution.

During the trial the defendants offered the findings and order of distribution which the County Court had made. Counsel for the state objected to the offer on the ground that the findings and order of the County Court were incompetent, and "also that the state had not made any claim as to the personal property of the decedent. While it is alleged in the information that he has left it, we have no claim as to the personal property, and therefore, as the court had no jurisdiction to settle the real estate, the findings would be of no value, and it is incompetent." The objection was overruled, and the court received the proffered evidence. A jury trial resulted in a verdict for the defendants, and the state appealed from the consequent judgment.

AFFIRMED.

For appellant there was a brief over the names of *Mr. John M. Wall*, *Mr. Edmund B. Tongue* and *Mr. Jay H. Upton*, with an oral argument by *Mr. Wall*.

For respondent William T. Finnigan, administrator, there was a brief and an oral argument by *Mr. Dan J. Malarkey*.

For respondents Thomas McNulty, Bridget McNulty, James McNulty, John McNulty, Rose McNulty

Walshe, John McNulty, James McNulty, Patrick McNulty, Catherine McNulty and Bridget McNulty Conlon, there was a brief over the names of *Mr. E. P. Stott* and *Mr. Ephraim B. Seabrook*, with an oral argument by *Mr. Stott*.

For respondents Mary McAndrews, Kate McNicholas and Shute Savings Bank, a corporation, there was a brief over the name of *Messrs. Bagley & Hare*, with an oral argument by *Mr. William G. Hare*.

MR. JUSTICE HARRIS delivered the opinion of the court.

1-3. The state is in no position to complain of the ruling which permitted the defendants to introduce the findings and order of the County Court. The state alleged in plain terms in the information that it was claiming the personal property as well as the realty; the answering defendants pleaded an adjudication of the County Court which, when proved, would utterly defeat the claim of the state to the personal property; and the state replied by denying that the County Court had made the adjudication. The pleadings raised a clear-cut issue concerning the personal property. Proof that the County Court made the order pleaded in the answers would prevent the personal property from being forfeited to the state (*State v. O'Day*, 41 Or. 495 (69 Pac. 542); *State v. McDonald*, 55 Or. 419 (103 Pac. 512, 104 Pac. 967, 106 Pac. 444), and it was therefore competent to prove the order which the County Court made. It is true that the trial court might have considered the oral statement of counsel as a waiver of the claim to the personal property which the state had made in its pleading; but it is also true that the state did not in unequivocal

terms admit the fact to be that the County Court had ordered a distribution of the personal property to persons whom that court had found were the heirs of James McNulty, and, since proof of the fact would establish the claim of the defendants and defeat the claim which the state had solemnly written into its pleadings, it was not prejudicial error for the trial court to permit the defendants to offer evidence of the order which had been made by the County Court: *Bannister v. Alderman*, 111 Mass. 261. By claiming the personal property, the plaintiff made it necessary for the defendants to plead the order of distribution; the defendants pleaded what it was necessary for them to plead and what they had a right to plead; and, consequently, they were entitled to prove what they had rightfully pleaded, so that, even if the state did make a binding disclaimer, that act did not of its own force necessarily render incompetent that which undeniably would be competent in the absence of a disclaimer. An oral renunciation of the pleaded claim to the personalty might have avoided the need of evidence to show that the plaintiff had no right to the personal property, but it would not necessarily prevent the court from permitting the introduction of evidence to prove that in truth the state had no rightful claim to the personalty.

4, 5. The County Court had authority to distribute the personal property, but it had no jurisdiction to determine the descent of the real property, and the state therefore argues that it was error to receive evidence of the order distributing the personalty because it also mentioned the real property. Even though it be assumed that the order was inadmissible to prove heirship to the real property, it was nevertheless competent to prove ownership of the personal

property, and its incompetency for one purpose did not destroy or even affect its competency for another purpose. An instruction limiting the evidence to the single issue which made it competent would have been proper; and, of course, when evidence is competent for one purpose but incompetent for another, it is error if the court refuses a request to limit the evidence to the purpose for which it is competent: 3 Ency. of Ev. 188. The plaintiff, however, made no such request, and therefore, in the language of Mr. Justice MOORE, in *Smitson v. Southern Pac. Co.*, 37 Or. 74, 89 (60 Pac. 907, 913):

“No error can well be predicated upon the court’s failure in that respect, in the absence of a request for such instruction”: 3 Ency. of Ev. 190.

Moreover, the state is now complaining, not on account of the mere failure of the court to limit the application of the evidence, but because of the admission of the evidence for any purpose.

6. The appellant next contends that the instructions of the court were too broad and “required the State of Oregon to prove that the deceased left no heirs”; and that the jury should have been required “to find whether the defendants, or some of them, in this proceeding, were the particular heirs of deceased.” An examination of the instructions given by the court will disclose that, when considered in their entirety, they are not open to the objection now being urged by the state. Quoting from the charge to the jury:

“So now there is the fact for you to determine: Did James McNulty at the time of his death during the year 1907 die without any heirs? And, so far as this particular case is concerned, before you can determine he died leaving heirs, you would have to find that some of those parties set up in the answer were his heirs.”

The remaining assignments of error will not be discussed, for the reason that the state does not argue them in its printed brief.

The judgment is affirmed.

'AFFIRMED.

MR. CHIEF JUSTICE MOORE, MR. JUSTICE BURNETT and MR. JUSTICE MCBRIDE concur.

Argued September 19, affirmed October 17, 1916.

PORTLAND v. GRAHS.

(160 Pac. 375.)

Criminal Law—Appeal—Incomplete Record.

1. On appeal from judgment of the Circuit Court dismissing complaint against defendant for violation of a city ordinance after conviction by the municipal court, where the only papers before the court were a copy of the original complaint, judgment in the municipal court, notice of appeal to the Circuit Court and the undertaking, the judgment of the Circuit Court, the notice of appeal on behalf of the state and its undertaking, the Supreme Court cannot determine whether the decision of the Circuit Court was erroneous.

Criminal Law—Appeal—Decision.

2. On the city's appeal from judgment of the Circuit Court holding unconstitutional an ordinance under which defendant had been convicted in municipal court, the Supreme Court must affirm, though the ordinance was constitutional, if the facts disclose that defendant was innocent, since a sound ruling of the Circuit Court as to guilt or innocence must be sustained, notwithstanding the Supreme Court's dissent from the reasons upon which it was made.

From Multnomah: **ROBERT G. MORROW, Judge.**

Department 1. Statement by MR. JUSTICE BURNETT.

In the municipal court of the City of Portland the defendant was convicted of the violation of a certain ordinance relating to the height of fences. He appealed to the Circuit Court. The result of the hearing in that tribunal was the following judgment:

“Now at this time this matter coming on for hearing, upon appeal from the municipal court of the City of Portland, wherein the defendant was fined the sum of \$25 for a violation of Section 483 of Ordinance No. 29,916, being entitled an ordinance amending Section 483 of Ordinance No. 21,455, as heretofore amended, and the facts having been stipulated herein, and the court having considered said ordinance and the facts, as stipulated, and being fully advised in the premises, finds that said Section 483 of said ordinance is unconstitutional and void, and it is therefore hereby considered, ordered and adjudged that the said complaint or action filed herein against the defendant be and the same is hereby dismissed, and it is further ordered and adjudged that the defendant's bondsmen be and he is released from further liability herein.”

The city has appealed.

AFFIRMED.

For appellant there was a brief over the names of *Mr. Walter P. La Roche*, City Attorney, and *Mr. Stanley Myers*, Deputy City Attorney, with an oral argument by *Mr. Myers*.

For respondent there was a brief over the name of *Messrs. Wilson, Neal & Rossman*, with an oral argument by *Mr. Oscar A. Neal*.

MR. JUSTICE BURNETT delivered the opinion of the court.

1, 2. There is no bill of exceptions. 'All we have before us is a copy of the original complaint in the municipal court; the judgment there; the notice of appeal to the Circuit Court and its attendant undertaking; the judgment of the latter tribunal already quoted; and the notice of appeal on behalf of the city, with its undertaking. In such a condition of the record we cannot determine whether the decision was erroneous or not. It may have been that the facts

stipulated did not disclose an offense against the municipal enactment. We are not concerned with the reason given by the court for its conclusion. If, indeed, the facts disclosed that the defendant was innocent, we would be compelled to uphold the decision of the Circuit Court, although the judge put it on the ground that the defendant was baldheaded, and hence entitled to favorable consideration. In paraphrase upon the language of Mr. Justice FIELD in *Pennoyer v. Neff*, 95 U. S. 714, 722 (24 L. Ed. 565), if this position is sound, the ruling of the Circuit Court as to the guilt or innocence of the defendant must be sustained, notwithstanding our dissent from the reasons upon which it was made. It is the duty of the appellant to put his finger on substantial error in the judgment as a result of the trial. It avails him nothing to quarrel with the argument of the court if the final determination may be right.

Owing to the paucity of the record, we cannot settle whether the ultimate conclusion of the court was erroneous or not, and hence the judgment must be affirmed.

AFFIRMED.

MR. CHIEF JUSTICE MOORE, MR. JUSTICE MCBRIDE and MR. JUSTICE BENSON concur.

Submitted on brief October 10, reversed October 17, 1916.

STATE v. MISHLER.

(160 Pac. 382.)

Indictment and Information—Following Language of Statute—Conversion by Trustee.

1. An indictment charging that defendant, being trustee of certain money for benefit of M., did, with intent to defraud, unlawfully convert it to his own use and benefit, being in the language of Section 1962, L. O. L., denouncing the crime of wrongful conversion of property by a trustee, is sufficient.

[As to when the charge of crime in indictment may be in language of the statute, see note in 94 Am. Dec. 253.]

Embezzlement—Indictment—Description of Money—Conversion by Trustee.

2. It is enough for an indictment under Section 1962, L. O. L., for conversion by a trustee to charge the conversion of "\$10,000," without alleging what kind of money it was; Section 1448, subdivision 6, declaring an indictment sufficient if the act charged as a crime is stated with such a degree of certainty as to enable a person of common understanding to know what is intended.

From Marion: PERCY R. KELLY, Judge.

In Banc. Statement by MR. JUSTICE McBRIDE.

The defendant, Adam J. Mishler, was indicted under Section 1962, L. O. L., for the crime of wrongful conversion of property by trustee. Said section is as follows:

"If any person, being the trustee of any property for the benefit of another, or for any public or charitable use, shall, with intent to defraud, by any means convert the same or any portion thereof to his own use or benefit, or to the use and benefit of another not entitled thereto, such person, upon conviction thereof, shall be punished by imprisonment in the county jail not less than three months nor more than one year, or by fine not less than \$50 nor more than \$1,000."

The material part of the indictment is as follows:

"Adam J. Mishler is accused by the grand jury of the county of Marion and State of Oregon, by this

indictment, of the crime of conversion by trustee committed as follows: The said Adam J. Mishler on the 25th day of July, A. D. 1914, in the county of Marion and State of Oregon, then and there being the trustee of \$10,000 for the benefit of Henry J. Miller, did then and there with the intent to defraud unlawfully convert said \$10,000 to his own use and benefit."

There was a demurrer on the ground of insufficiency, which being sustained, the state appeals.

REVERSED.

For plaintiff-appellant there was a brief submitted over the name of *Mr. Ernest R. Ringo*, District Attorney.

For defendant-respondent there was a brief prepared by *Mr. Julius N. Hart*.

MR. JUSTICE McBRIDE delivered the opinion of the court.

1. While the indictment is so meager in its statement of the acts constituting the offense that it comes very close to the line, we think it is sufficient. The offense is clearly a creature of the statute, and we have held that, as a general rule, it is sufficient in such cases to charge the facts constituting the offense in the language of the statute: *State v. Carr*, 6 Or. 133; *State v. Ah Sam*, 14 Or. 347 (13 Pac. 303); *State v. Lee*, 17 Or. 488 (21 Pac. 455); *State v. Light*, 17 Or. 358 (21 Pac. 132); *State v. Shaw*, 22 Or. 287 (29 Pac. 1028); *State v. Carmody*, 50 Or. 1 (91 Pac. 446, 1081, 12 L. R. A. (N. S.) 828). There are no adjudicated cases in this state directly involving this particular statute, but in cases of larceny by bailee, which offense is similar and closely akin to the crime here charged, we find frequent decisions to the effect that it is sufficient to

charge the offense in the words of the statute: *State v. Thompson*, 28 Or. 296 (42 Pac. 1002); *State v. Chapin*, 74 Or. 346 (144 Pac. 1187). If in a case of larceny by bailee it is unnecessary to set out in the indictment the nature of the bailment or the circumstances under which the accused became bailee, it would seem equally unnecessary in an indictment for the unlawful conversion of money by a trustee to set up the facts or circumstances by which the defendant became trustee or to allege the precise way in which he converted the money to his own use. Whether he bought property with it, lost it at cards or contributed it to charity is not material if he actually converted it, and the manner in which it was disposed of or converted would in many, if not most, instances be known only to himself. For fraudulent conversion of money by an agent, Mr. Bishop, in *Directions and Forms*, Section 408, gives the following precedent:

“That before the finding of this indictment, A., etc., being the agent or clerk of X., the said X., not being an apprentice, or under the age of eighteen years, embezzled, or fraudulently converted to his own use, money to about the amount of eighteen hundred dollars, and a bill of exchange to about the amount of eighteen hundred dollars, which came into his possession by virtue of his employment, against the peace,” etc.

The indictment here substantially follows the form quoted, leaving out the allegation “not being an apprentice or under the age of eighteen years,” which seems to have been a statutory exception in the State of Alabama, from which state the form given by Mr. Bishop was adopted.

2. The next objection, and one upon which the authorities disagree, is that the indictment fails to specify the kind of money converted. It is urged that as the

indictment simply alleges that the defendant converted \$10,000, and does not state that such sum was of any value or was lawful money of the United States, there is room for the intendment that it was composed of "dollars" of Mexico, Confederate money, or worthless currency of some foreign country. We will first consider this contention upon principle. Our statute (subdivision 6, Section 1448, L. O. L.) provides, in substance, that the indictment shall be sufficient if the act charged as a crime is stated with such a degree of certainty as to enable a person of common understanding to know what is intended. Now, what does a "person of common understanding" actually understand when he hears the term "dollar" applied to a financial transaction? If he goes into a store and inquires the price of a coat and is told that it is \$20, he does not inquire whether the salesman means \$20 in Confederate money, Mexican money, or currency, or in Peruvian currency. He understands and knows that the currency of this country is meant. The laws of this country at one time recognized the Mexican dollar and made it current, but that law is now repealed and we recognize but one kind of dollar, the American dollar, which, considered either as a single coin or as a unit of value, is current for 100 cents and represents 100 cents of the currency of the United States. How much more information would the defendant here have had if the indictment had followed the ancient forms and charged that he "converted to his own use ten thousand dollars of the coins and currency of the United States of the value of ten thousand dollars, the particular denomination of said coins and currency being to the grand jury unknown"? Manifestly none. The allegations would have been as useless as "not having the fear of God before his eyes," or "being

instigated by the devil," which our forefathers deemed so essential to a good indictment; nor could it prejudice the defendant upon the trial. If under this indictment the state had undertaken to show that the defendant converted ten thousand so-called dollars of Confederate money or other foreign currency, the testimony would have been promptly rejected on the ground that our law recognized no such "dollars," and that the indictment must be taken to mean American money. In larceny, either statutory or at common law, there were reasons for describing the coins taken. One reason was because in larceny it was sometimes essential to identify the particular coins taken. If, for instance, a \$20 gold piece and a half dollar were taken from the person of A, and B, previously impecunious, was found with a \$20 gold piece and a silver half dollar in his possession, this fact might, in connection with other circumstances, tend to identify him as the thief, and it was deemed proper, therefore, to give the defendant notice so far as possible of the exact description of the property he was charged with having stolen. This was especially true with respect to property other than money in those cases where the punishment of the offense depended upon the amount or value of the thing stolen. Even in such cases it has not been deemed essential to state that the value of the property was a particular sum in United States money. Thus, in form No. 11, page 1012, L. O. L., we find the statutory form for an indictment for larceny is as follows:

"Feloniously took and carried away a gold watch (or as the case may be), the personal property of C. D.
* * of the value of more than \$35."

The word "dollars" means money in the form of the lawful currency of the United States: *United States v. Van Auken*, 96 U. S. 366 (24 L. Ed. 852). The word

“dollar” means a certain amount of money and is of some value. An information for false pretenses which alleges that the accused with intent to defraud prosecutor obtained from prosecutor the sum of \$20, the property of prosecutor, is not objectionable as failing to allege that the money was worth something: *State v. Ryan*, 34 Wash. 597 (76 Pac. 90). This was a prosecution for obtaining money under false pretenses, and the opinion of the court is not only in point upon the exact question here under discussion, but also sustains our view upon the other questions discussed in this opinion, and is from a state whose statute contains provisions similar to ours concerning the certainty required in indictments: See, also, *People v. Millan*, 106 Cal. 320 (39 Pac. 605); *Oliver v. State*, 37 Ala. 134; *State v. Wilkerson*, 98 N. C. 696 (3 S. E. 683); *United States v. Fuller*, 5 N. M. 80 (20 Pac. 175); *Territory v. Hale*, 13 N. M. 181, 186 (81 Pac. 583, 13 Ann. Cas. 551, 584). The case last cited contains a very full discussion of the whole subject, from which we quote the following:

“But there is no allegation of the value of the money embezzled. The statute fixing the punishment regulates the same according to the value of the property embezzled, and, consequently, the value of the money must in some way appear in the indictment and proof. If it appears in this case, it appears by reason of the use of the words, ‘dollars, in money.’ The question, but arising under the postal laws of the United States, was before this court in *United States v. Fuller*, 5 N. M. 80 (20 Pac. 175). The indictment in that case was founded upon the clause of Section 5467, Rev. Stats. U. S., which condemns the embezzlement of any letter or packet containing ‘any other article of value,’ and alleged the letter to contain ‘eight hundred dollars,’ without further description or allegation of value. In answer to the contention

of counsel for appellant in that case the court said: 'If the packet had contained any other article to which the law fixes no certain value, then this would undoubtedly be true. For instance, a piece of jewelry. The law places no value on such article. Its value, if any, is regulated entirely by the usage of trade, and the law of supply and demand, and such value should be laid in the indictment, in the current money of the country, made by law the standard or unit of value. To charge that eight hundred dollars is of the value of eight hundred dollars, would add no force or weight to the indictment. It would not make the charge stronger, nor would it give the defendant any more information of the nature and cause of the accusation against him than is contained in this indictment.' (The quotation, differing slightly from the printed report, is taken from the original opinion on file in this court.) It is here announced, in effect, that the word 'dollar' used in an indictment purports value and obviates the necessity of such an allegation. It is further said, in effect, that alleging a given number of dollars is alleging the same number of dollars in value. That case differed from this in that there are no grades of the offense under the federal statutes while under our statutes the offense has two grades according as the amount embezzled is less or more than a specified sum: Sections 1126, 1187, C. L. 1897. But if the allegation of so many dollars is an allegation of the same number of dollars in value, the difference between the two cases is of no importance. We are compelled, therefore, to hold the indictment in this case sufficient in this particular or depart from the holding in the Fuller Case. This we are not inclined to do. This view finds support in a few cases (*State v. Alverson*, 105 Iowa, 152 [74 N. W. 770]; *Gady v. State*, 83 Ala. 51 [3 South. 429]; *Warren v. State*, 29 Tex. 369); but we recognize it to be a departure from the current of authority, at least in cases arising under state or territorial statutes (2 Bish. Cr. Proc., §§ 320, 713; Wharton, Crim. Pl. & Pr., §§ 213-218; *Brown v. People*, 173 Ill. 34 [50 N. E. 106]; *State v.*

Stimson, 24 N. J. Law, 9; *Bork v. People*, 16 Hun [N. Y.], 476; *Reside v. State*, 10 Tex. App. 675; *Grant v. State*, 35 Fla. 581 [17 South. 225, 48 Am. St. Rep. 263]; *State v. Thompson*, 42 Ark. 517; *People v. Donald*, 48 Mich. 491 [12 N. W. 669]; *Stephens v. State*, 53 N. J. Law, 245 [21 Atl. 1038].) It may be said, however, that this rule in regard to allegation of value, founded in reason as it is, and inflexible so far as concerns all property except money, has little reason to support it in a country like ours, where all forms of money are by law and in fact of uniform value. It becomes a mere naked rule of law, serving no useful purpose and affording persons charged with the larceny or embezzlement of money no additional safeguard against unjust conviction."

In the case last mentioned an officer was indicted for the embezzlement of public funds, in which cases some of the courts seem to hold that less particularity is required in describing the kind and value of the money converted than in those where the victim was a private individual; but in a case like the present it is difficult to see why a *cestui que trust* should be in any better position to know what particular description of coins or money his trustee had in his hands than the general public has of knowing the same fact when the money is received and embezzled by a public officer. The case of *Territory v. Hale*, 13 N. M. 181, 186 (81 Pac. 583, 13 Ann. Cas. 551, 584), mention the distinction only to show that it is immaterial, and in most of the cases cited above the victim was a private person.

Many cases hold the contrary view following the common-law rule, which has long been done away with in England by statute, and, as above shown, discredited by the latter authorities in this country as obsolete and having no foundation in reason.

The judgment of the Circuit Court is reversed and the cause remanded for trial.

REVERSED AND REMANDED.

Argued June 21, reargued September 15, reversed October 17, 1916.

COATES v. SMITH.

(160 Pac. 517.)

Acknowledgment—Sufficiency of Certificate of Acknowledgment.

1. In considering the sufficiency of the certificate of acknowledgment of a mortgage, the whole instrument should be examined.

Acknowledgment—Certificate—Names of Mortgagors—Clerical Error—Statute.

2. Under Section 7109, L. O. L., relative to certificates of acknowledgment of mortgages, where the certificates of acknowledgment of a mortgage identified the parties as known to the officer taking the acknowledgment to be the persons executing the instrument, the fact that the names appeared spelled as "Samuel H. Smith" and "Adora L. Smith," instead of the names of the mortgagors, Chester A. Smith and Otis S. Smith, will not vitiate the instrument, the presumption being that the variance in names was the result of a mere clerical error, as the material matter is the identification of the mortgagors, and not the notation of their names.

[As to when defects in acknowledgments are, and when they are not, fatal, see note in 108 Am. St. Rep. 525.]

Vendor and Purchaser—Certificate of Acknowledgment—Record—Notice.

3. A certificate of acknowledgment of a mortgage failing to name the acknowledging party does not affect the validity of the acknowledgment, where reference is made in the certificate to the party who executed the conveyance, nor does it render the record of the instrument less efficacious to impart constructive notice to a subsequent purchaser.

[As to conclusiveness of certificate of acknowledgment, see notes in 1 Am. Dec. 81; 54 Am. St. Rep. 150.]

Acknowledgment—Certificate—Sufficiency.

4. The language of a certificate of acknowledgment of a mortgage will be liberally construed, and, when it refers to the conveyance, reference may be had to the body of the deed or mortgage in aid of the certificate, which is sufficient if the two together show a substantial compliance with the statute.

Acknowledgment—Duty of Officer Taking—Presumption—Statute.

5. There is a presumption that the officer taking an acknowledgment of a deed or mortgage complied with Section 7109, L. O. L.,

requiring that he know or have satisfactory evidence that the person making the acknowledgment is the individual described in and who executed the conveyance.

Acknowledgment—Mortgages—Form.

6. No particular form is required for an individual acknowledgment of a mortgage.

Bankruptcy—Right of Trustee—Bona Fide Purchaser.

7. A trustee in bankruptcy, having the right of an attaching creditor, is not *ipso facto* a *bona fide* purchaser for value, and that he is such a purchaser, unaffected by outstanding equities against the bankrupt, is an affirmative defense, which must be pleaded and proved.

Reformation of Instruments—Equitable Jurisdiction—Parol Testimony.

8. Equity will exercise its jurisdiction for the correction or reformation of a written instrument on the ground of mutual mistake, and for such purpose will receive parol testimony.

Reformation of Instruments—Between What Parties.

9. Reformation of a written instrument on the ground of mutual mistake will be decreed in a court of equity as between the original parties or those claiming under them in privity, such as judgment creditors.

Reformation of Instruments—Mistake—Pleading.

10. In a suit to reform a deed or written contract on the ground of mistake, plaintiff should plead the particular circumstances constituting the mistake.

Reformation of Instruments—Suit to Reform Note and Mortgage—Complaint—Sufficiency.

11. In suit to reform a note and mortgage against the mortgagors and the trustee in bankruptcy of one of them, where the complaint did not show that it was the intention of the parties that an alleged oral agreement as to the time of payment of interest should be incorporated in the note, nor that it was not the intention of either of the parties to rely upon the oral agreement, averred to have been made both before and after the execution of the note, and did not disclose when the alleged omission was discovered by plaintiff, nor what instructions were given the scrivener, or by whom, asserting no fraud on the part of the mortgagors, the circumstances relating to the transaction, as set forth, being very meager, such complaint was insufficient against demurrer on the ground that it did not state facts sufficient to constitute a cause of action.

Costs—Appeal and Error—Failure to Raise Point Below.

12. In suit to reform a note and mortgage, where the specifications of a defendant's demurrer to the complaint did not direct the attention of the trial court to the point urged against it on such defendant's appeal, he could not recover costs, though successful.

From Multnomah: CALVIN U. GANTENBEIN, Judge.

In Banc. Statement by MR. JUSTICE BEAN.

This is a suit in equity to reform and foreclose a mortgage for \$1,621, and interest, executed on January 2, 1913, by the defendants Chester A. Smith and Otis S. Smith. A demurrer was filed and sustained to the complaint. An amended complaint and a supplemental complaint were thereafter filed. Defendant R. L. Sabin, trustee in bankruptcy, demurred to the amended complaint.

It is shown by the pleadings of plaintiff that on January 2, 1913, the defendants Chester A. Smith and Otis S. Smith executed to plaintiff their promissory note as follows:

“\$1,621. Portland, Oregon, January 2, 1913.

“Five years after date, without grace, we promise to pay to the order of Catherine Coates sixteen hundred and twenty-one dollars, for value received, with interest after date at rate of 7 per cent per annum until paid. Principal and interest payable in U. S. gold coin at Sunnyside, Portland, Oregon, and in case suit or action is instituted to collect this note, or any portion thereof, we promise to pay such sum as the court may adjudge reasonable as attorney’s fees in said suit or action. There may be paid on any interest-bearing date any amount in even hundred dollars.

“CHESTER A. SMITH.

“OTIS S. SMITH.”

On the same date, for the purpose of securing the payment of the note, defendants Chester A. Smith and Otis S. Smith executed their real estate mortgage, which is set forth *in haec verba* in the complaint, to which was affixed the following certificate of acknowledgment, omitting the formal parts:

“On the 2d day of January, A. D. 1913, personally came before me, a notary public in and for said county and state, the within named Samuel H. Smith and

Adora L. Smith, his wife, to me personally known to be the identical persons described in and who executed the foregoing instrument, and acknowledged to me that they executed the same freely for the uses and purposes therein mentioned.”

This mortgage was duly recorded on January 2, 1913. No interest having been paid on the note, plaintiff elected to declare the whole amount due, and instituted proceedings to foreclose the mortgage. In addition to the allegations of the original complaint, the pleadings of the plaintiff contained the following:

“That at the time the said note was executed and subsequent to the date of its execution, the said defendants Chester A. Smith and Otis S. Smith orally promised and agreed to pay the said interest provided for in said note yearly, that is, to pay the interest on the principal sum of said note on or about the second day of January of each year, after the time of the execution of said note, but that the scrivener who drew up the said note neglected to state in said note that the interest made payable thereby should be paid annually; that at the time of the execution of said note it was, and now is, the custom to pay the interest on promissory notes annually when the time of payment of said note is not stated in said note, and the said custom was known to the plaintiff and the defendants at the time of the execution of said note; that at the time of the execution of said note and mortgage the said E. C. Minor, who acknowledged the same as notary public, erroneously inserted in the acknowledgment of said mortgage the names of Samuel H. Smith and Adora L. Smith, wife of said Samuel H. Smith, in place and instead of the names of the makers of said mortgage, and that the insertion of said names of Samuel H. Smith and Adora L. Smith was through the error, inadvertence and mistake of the said E. C. Minor, and that the said defendants Chester A. Smith and Otis S. Smith were present at the execution thereof, and in the presence of said notary public acknowledged the

execution of said document, and that it was the intention of said scrivener or notary public to insert the names of said Chester A. Smith and Otis S. Smith in the said acknowledgment instead of the names of said Samuel H. Smith and Adora L. Smith.”

Plaintiff prayed that the note and mortgage be reformed to correct the alleged mistake.

It appears that in May 1914, subsequent to the date of the execution of the mortgage, the defendant Chester A. Smith was declared bankrupt; that thereafter, about May 28, 1914, R. L. Sabin, one of the defendants, was elected by the creditors of Chester A. Smith, as trustee in bankruptcy for the latter, and that he has duly qualified as such. It further appears that on April 21, 1913, defendant Otis S. Smith executed a deed conveying all his right and title in the real property mortgaged to defendant Chester A. Smith, in consideration of the sum of \$1,500, to be paid thereafter, with interest at 6 per cent, and that such deed was duly recorded; that on June 17, 1914, Otis S. Smith filed his claim against the estate of Chester A. Smith, bankrupt, in the sum of \$1,566.50, based upon the note given for the conveyance of said real estate, and received from the trustee in bankruptcy 3 per cent on the amount claimed. The defendant Chester A. Smith made no defense to this suit. The defendant R. L. Sabin made no answer and has pleaded no equities for the creditors in the bankruptcy proceedings.

The defendant Otis S. Smith filed an answer setting up that at the date of the execution of the mortgage he was a minor, and therefore not liable upon his contract.

Plaintiff filed a supplemental complaint pleading therein facts occurring subsequently to the date of filing the original and amended complaints as a waiver and estoppel against the defendant Otis S. Smith of

his right to plead infancy as a defense, and setting forth particularly that all right, title and interest owned by him in the real property described in the mortgage had been conveyed to Chester A. Smith. No other or additional allegations affecting the rights or interests of the defendant R. L. Sabin, other than as appeared in the amended complaint, were contained in the supplemental complaint. Otis S. Smith defaulted, and R. L. Sabin filed a demurrer identical in terms with the demurrer filed to the amended complaint. The court entered his default, and also a judgment and decree on the pleadings reforming the note and mortgage and foreclosing the latter as reformed. From this decree R. L. Sabin, trustee in bankruptcy for defendant Chester A. Smith, appeals.

REVERSED.

For appellant there was a brief and an oral argument by *Mr. Sidney Teiser*.

For respondent there was a brief over the names of *Messrs. Kollock, Zollinger & McDowell* and *Messrs. Jeffrey & Lenon*, with an oral argument by *Mr. John K. Kollock*.

MR. JUSTICE BEAN delivered the opinion of the court.

It is contended by defendant R. L. Sabin that he is an innocent third party, that the acknowledgment of the mortgage did not entitle the same to be recorded, and that therefore the recordation imparted no notice to the trustee, and that the latter took the title to the property unaffected by the plaintiff's mortgage.

1-4. In the consideration of the certificate of the acknowledgment of the mortgage the whole instrument should be examined. Where the certificate of acknowl-

edgment of a conveyance identifies the parties as known to the officer taking the acknowledgment to be the persons who executed the same, the fact that the names of the parties appear in such certificate spelled as "Samuel H. Smith" and "Adora L. Smith" instead of the names of the mortgagors, Chester A. Smith and Otis S. Smith, will not vitiate the instrument. It will be presumed that such variance in names is the result of a clerical error merely: 1 C. J., p. 848, note 67b; 1 R. C. L., p. 284, § 62; *Rodes v. St. Anthony & Dakota Elevator Co.*, 49 Minn. 370 (52 N. W. 27); *Bell v. Evans*, 10 Iowa, 353. The material matter in such a certificate of acknowledgment is the identification of the mortgagors, and not the notation of their names. The one in question shows that the officiating notary declares that the persons appearing before him and acknowledging the execution of the instrument are personally known to him to be the identical persons described therein, and who executed the same. It therefore appears from the instrument that the officer taking the acknowledgment identified the mortgagors, although he did not correctly write their names.

Under our statute there is no specific requirement that the name of a grantor or mortgagor shall be contained in the certificate of acknowledgment. Section 7109, L. O. L., directs that:

"The officer taking such acknowledgment shall indorse thereon a certificate of the acknowledgment thereof, and the true date of making the same, under his hand."

If the certificate shows that such officer knows that "the person making such acknowledgment is the individual described in and who executed such conveyance," the identification is complete according to Section 7119, L. O. L. No other description or

name of the grantor is absolutely essential. Omitting the erroneous names, which may be treated as surplusage, the certificate in the present case plainly identifies the mortgagors. A reference to the mortgage clearly indicates that the names written in the certificate, and also the description of one of the mortgagors as the wife of the other, when both are designated in the conveyance as "single," are clerical errors. It is now well established by the great weight of authority that a certificate failing to name the acknowledging party where reference is made in the certificate to the party who executed the conveyance does not affect the validity of the acknowledgment: 1 R. C. L., p. 284, § 62; *Larson v. Elsner*, 93 Minn. 303 (101 N. W. 307, 2 Ann. Cas. 989, and note); *Pickett v. Doe*, 5 Smedes & M. (Miss.) 470 (43 Am. Dec. 523); *Milner v. Nelson*, 86 Iowa, 452 (53 N. W. 405, 41 Am. St. Rep. 506, 19 L. R. A. 279, and note); *Wilcoxon v. Osborn*, 77 Mo. 621. Neither does it render the record of the instrument less efficacious. The record of such an instrument is sufficient to impart constructive notice to a subsequent purchaser in good faith without actual knowledge: *Milner v. Nelson*, 86 Iowa, 452 (53 N. W. 405, 19 L. R. A. 279). The language of such certificate will be accorded a liberal construction, and, when it refers to the conveyance, reference may be had to the body of the deed or mortgage in aid of the certificate of acknowledgment, and, if the two together show a substantial compliance with the statute, it is sufficient: 1 C. J., p. 846, § 187; 1 R. C. L., p. 282, § 59; 1 Cyc. 585, 586; *Bell v. Evans*, 10 Iowa, 353; *Milner v. Nelson*, 86 Iowa, 453 (53 N. W. 405, 19 L. R. A. 279); *Wilcoxon v. Osborn*, 77 Mo. 621; *Carpenter v. Dexter*, 8 Wall. 513 (19 L. Ed. 426); *Bird v. McClelland etc. Co.* (C. C.), 45 Fed. 458; *Geekie v. Kirby*

Carpenter Co., Fed. Cas. No. 5295; *Frederick v. Wilcox*, 119 Ala. 355 (24 South. 582, 72 Am. St. Rep. 925); *Touchard v. Crow*, 20 Cal. 150 (81 Am. Dec. 108); *Wilson v. Russell*, 4 Dak. 376 (31 N. W. 645); *International Kaolin Co. v. Vause*, 55 Fla. 641 (46 South. 3); *Summer v. Mitchell*, 29 Fla. 179 (10 South. 562, 30 Am. St. Rep. 106, 14 L. R. A. 815); *Rackleff v. Norton*, 19 Me. 274; *King v. Merritt*, 67 Mich. 194 (34 N. W. 689); *Hughes v. Morris*, 110 Mo. 306 (19 S. W. 481); *Graham v. Whitely*, 26 N. J. Law, 254; *Bauer v. Schmelcher* (City Ct. Brook.), 5 N. Y. Supp. 423; *Beckel v. Petticrew*, 6 Ohio St. 247; *Dahlem's Estate*, 175 Pa. 454 (34 Atl. 807, 52 Am. St. Rep. 848); *Love v. Shields*, 3 Yerg. (Tenn.) 405; *Gulf etc. Ry. Co. v. Carter*, 5 Tex. Civ. App. 675 (24 S. W. 1083); *Chandler v. Spear*, 22 Vt. 388; *Blake v. Hollandsworth*, 71 W. Va. 387 (76 S. E. 814, 43 L. R. A. (N. S.) 714); *Hiles v. La Flesh*, 59 Wis. 465 (18 N. W. 435). It is unnecessary to reform the certificate of acknowledgment.

5, 6. The substantial requirement of the recording statute should not unnecessarily be sacrificed for an obvious clerical mistake. It does not appear that anyone has been misled or injured thereby, and the acknowledgment and record of the mortgage were not thereby invalidated. Section 7119, L. O. L., requires that the officer taking the acknowledgment know, or have satisfactory evidence, that the person making it is the individual described in and who executed the conveyance, and it is presumed that the officer did his duty. The officer taking acknowledgment of a deed in this state is required to indorse thereon a certificate of the acknowledgment thereof: Section 7109, L. O. L. No particular form is required for an individual acknowledgment. The mortgage of plaintiff was acknowledged so as to entitle the same to record, and

was therefore constructive notice of plaintiff's equity, notwithstanding the notary's clerical error in the certificate: 1 Am. & Eng. Ency. of Law (2 ed.), p. 547b; *King v. Merritt*, 67 Mich 194 (34 N. W. 689); *Kentucky Land Co. v. Crabtree*, 113 Ky. 922 (70 S. W. 31); *Shelton v. Aultman Co.*, 82 Ala. 315 (8 South. 232). As stated in 1 Am. & Eng. Ency. of Law, *supra*.

"Whenever substance is found, obvious clerical errors and technical omissions or defects will be disregarded."

In 1 C. J., p. 848, § 190, the rule is thus laid down:

"Where, from an inspection of the whole instrument, it appears with reasonable certainty that the person who acknowledged was the one who executed it, the clerical error in stating the name of the grantor will not invalidate the instrument."

The following principle is briefly stated in the case of *Platt v. Rowand*, 54 Fla. 237 (45 South. 32):

"The declared and settled policy of the law as construed by this court is 'to uphold certificates of acknowledgment of deeds, and wherever substance is found obvious, clerical errors and all technical omissions will be disregarded.' "

Any interest that the trustee in bankruptcy may have in the premises is subordinate to the lien of plaintiff's mortgage.

7-12. It is next contended by counsel for the defendant trustee that a reformation of a written instrument will not be decreed as against third parties whose rights were acquired without notice of the circumstances, and that the trustee is such a party. It is therefore pertinent to inquire as to the status of the trustee.

Bankruptcy Act of July 1, 1898, Chapter 541, Section 47, subdivision "a," clause 2, 30 Stat. 557 (U. S.

Comp. Stats. 1901, p. 3438), as amended by act of June 25, 1910, Chapter 412, Section 8, 36 Stat. 840 (U. S. Comp. Stats. Supp. 1911, p. 1500 [U. S. Comp. Stats. 1913, § 9631]), provides that a bankrupt's trustee, as to all the property in the custody or coming into the custody of the bankruptcy court, shall be vested with all rights, remedies and powers of a creditor holding a lien by legal or equitable proceedings thereon, and as to all property not in the bankruptcy court the rights of a judgment creditor holding an execution duly returned unsatisfied: See *Pacific State Bank v. Coats*, 205 Fed. 618 (123 C. C. A. 634, Ann. Cas. 1913E, 846). Under the amended statute a trustee in bankruptcy is in the position of a lien creditor, and as stated by Mr. Remington in his work on Bankruptcy, has—

“whatever rights creditors under state law would have had had they been ‘armed with process,’ whether actually so ‘armed’ or not; the trustee being deemed a levying creditor, so far as property in the custody of the bankruptcy court is concerned, and a creditor armed with an execution returned unsatisfied as to property not in such custody”: 2 Remington, Bankruptcy, § 1207.

In Collier on Bankruptcy, page 660, it is stated:

“The purpose of Congress was to embrace within these words every class of creditors with liens by legal or equitable proceedings favored by the varying registration laws of each of the states.”

Assuming that the rights of the trustee are equal to those of an attaching creditor under our statute, and considering the case first from such standpoint, it is the settled law in this state that a trustee having the right of an attaching creditor is not *ipso facto* a *bona fide* purchaser for value. That one is such a

purchaser, and not affected by outstanding equities, is an affirmative defense which must be pleaded and proved. Before an attaching creditor or one standing in an equal position can be deemed a purchaser in good faith, he must allege and prove all the facts necessary to establish that character of his ownership: *Rhodes v. McGarry*, 19 Or. 222, 229 (23 Pac. 971); *Meier v. Hess*, 23 Or. 599, 601 (32 Pac. 755); *Raymond v. Flavel*, 27 Or. 219, 248 (40 Pac. 158); *Laurent v. Lanning*, 32 Or. 18 (51 Pac. 80); *Dimmick v. Rosenfeld*, 34 Or. 101, 105 (55 Pac. 100); *Flegel v. Koss*, 47 Or. 366 (83 Pac. 847); *Jennings v. Lentz*, 50 Or. 483, 487 (93 Pac. 327, 29 L. R. A. (N. S.) 584); *Ayre v. Hixson*, 53 Or. 19, 27 (98 Pac. 515, 133 Am. St. Rep. 819, Ann. Cas. 1913E, 659); *Barnes v. Spencer*, 79 Or. 205 (153 Pac. 47). It would seem from the record in this case that, at the most, the standing of the trustee in bankruptcy is equal to that of a judgment creditor: *Pacific State Bank v. Coats*, 205 Fed. 618, 626 (123 C. C. A. 634, Ann. Cas. 1913E, 846); *Cooper Grocery v. Park*, 218 Fed. 42, 43 (134 C. C. A. 64); *Smith v. Bank*, 57 Or. 82, 86 (110 Pac. 410).

Section 7129, L. O. L., provides thus:

“Every conveyance of real property within this state hereafter made, which shall not be recorded as provided in this title within five days thereafter shall be void against any subsequent purchaser in good faith and for a valuable consideration of the same real property, or any portion thereof, whose conveyance shall be first duly recorded.”

Equity will exercise its jurisdiction for the correction or reformation of a written instrument on the ground of mutual mistake, and for this purpose will receive parol testimony: *Jones, Ev.*, § 437.

Reformation of a written instrument on the ground of mutual mistake will be decreed in a court of equity

as between the original parties or those claiming under them in privity, such as judgment creditors: 1 Story, Eq. Juris. (13 ed.), § 165; *Lally v. Holland*, 1 Swan (Tenn.), 396; *Smith v. Interior Warehouse Co.*, 51 Or. 578, 581 (94 Pac. 508, 95 Pac. 499); *Howard v. Tettelbaum*, 61 Or. 145 (120 Pac. 373); *Zartman v. First Nat. Bank*, 216 U. S. 134 (54 L. Ed. 418, 30 Sup. Ct. Rep. 368); *Meier v. Kelly*, 22 Or. 136 (29 Pac. 265). Mr. Elliott, in his work on Contracts (Volume 3, Section 2381), says:

“In cases of mistake in written contracts equity may interfere, not only as between the original parties, but those claiming under them in privity, such as personal representatives, heirs, assignees and the like. * * However, reformation will not be granted where intervening rights of *bona fide* purchasers for value will be prejudiced, and it has been held that this protection will be extended to the grantee of a *bona fide* purchaser, even though he had notice of the mistake.”

In *Zartman v. First Nat. Bank*, 216 U. S. 134 (54 L. Ed. 418, 30 Sup. Ct. Rep. 368), which was a suit to reform a written contract, it was held that the jurisdiction which equity has to decree correction of errors in written contracts caused by mutual mistake is not suspended by the bankruptcy law; and the trustee takes property as the debtor had it at the time of the petition subject to all valid claims, liens and equities, including the power of a court of equity to correct a manifest error by mutual mistake in an agreement made prior to the petition.

Was the note due when this suit was instituted? In order that this may be shown, it is necessary to reform the note to conform to the agreement of the parties as they intended the same to be executed. The defendant demurred to the complaint and supplemen-

tal complaint, and insists that the same are insufficient for such purpose. Each demurrer was as follows:

“Comes now R. L. Sabin, trustee in bankruptcy, one of defendants herein, and demurs to plaintiff’s amended complaint for the reason that the same does not state facts sufficient to constitute a cause of action: I. That the note set forth in said complaint shows upon its face that the same is not due, and consequently that there has been no default in the payment of interest, and nothing is set forth in said complaint to modify or change the rule that a written instrument cannot be varied by parol evidence. II. That the mortgage, copy of which is set forth in said complaint, and foreclosure of which is prayed, is not a valid mortgage as against the trustee in bankruptcy, same showing upon its face that it was not acknowledged by the makers thereof as prescribed by law. III. That said complaint does not show that permission of the District Court of the United States for the District of Oregon was obtained before suit was instituted against R. L. Sabin, who is an officer of said court.”

In *Sellwood v. Henneman*, 36 Or. 575, at page 577 (60 Pac. 12, at page 13), Mr. Justice MOORE states the rule as follows:

“It has been repeatedly held by this court that, in a suit to reform a deed or written contract on the ground of mistake, the complaint should distinctly show the original agreement of the parties, and point out with clearness and precision wherein there was a mistake.”

See, also, *Ramsey v. Loomis*, 6 Or. 367; *Hyland v. Hyland*, 19 Or. 51 (23 Pac. 811); *Hughey v. Smith*, 65 Or. 323 (133 Pac. 68); and cases to which those opinions refer.

The particular circumstances constituting the mistake should be pleaded: 14 Ency. Pl. & Pr., pp. 43, 45, and notes; 18 Ency. Pl. & Pr., p. 824.

The complaint does not show that it was the intention of the parties that the alleged oral agreement as to the time of payment of interest should be incorporated in the note, nor that it was not the intention of either of the parties to rely upon the oral agreement which is averred to have been made both before and after the execution of the note. When the alleged omission was discovered by plaintiff is not disclosed; nor what instructions were given to the scrivener or by whom. No fraud on the part of the payors is asserted. The circumstances relating to the transaction as set forth in the pleading are very meager. While it may be possible that, in the absence of a demurrer, the complaint might be held sufficient, a majority of the members of the court are of the opinion that there was error in overruling the demurrer.

The decree of the lower court, therefore, will be reversed, and the cause remanded for such further proceedings as may be deemed proper, not inconsistent herewith. A default decree was rendered against the trustee defendant. He failed to ask the trial court to set the same aside. To have this done appears to be the main purpose of this appeal: See Section 103, L. O. L.; *White v. Northwest Stage Co.*, 5 Or. 99; *Bailey v. Williams*, 6 Or. 71; *Mayer v. Mayer*, 27 Or. 133 (39 Pac. 1002). It is doubtful if the specifications of the demurrer directed the attention of the trial court to the point now urged against the complaint. Neither party, therefore, should recover costs upon this appeal.

REVERSED.

MR. JUSTICE BURNETT delivered the following dissenting opinion:

On January 2, 1913, Chester A. Smith and Otis S. Smith executed and delivered to the plaintiff their

promissory note of that date, of which a copy is here set out:

“\$1,621. Portland, Oregon, January 2, 1913.

“Five years after date, without grace, we promise to pay to the order of Catherine Coates sixteen hundred and twenty-one dollars, for value received, with interest after date at rate of 7 per cent per annum until paid. Principal and interest payable in U. S. gold coin at Sunnyside, Portland, Oregon, and in case suit or action is instituted to collect this note, or any portion thereof, we promise to pay such sum as the court may adjudge reasonable as attorney’s fees in said suit or action. There may be paid on any interest-bearing date any amount in even hundreds dollars.

“CHESTER A. SMITH.

“OTIS S. SMITH.”

At the same time they mortgaged to her certain real property in the usual form, conditioned that, if the money due upon the note should be paid, the mortgage should be void, but in case default should be made in payment of the principal and interest, as provided in the note, then she might sell the premises in the manner prescribed by law, etc. Appended to this mortgage was an acknowledgment in the following form:

“State of Oregon,

County of Multnomah—ss:

“On the second day of January, A. D. 1913, personally came before me, a notary public in and for said county and state, the within named Samuel H. Smith and Adora L. Smith, his wife, to me personally known to be the identical persons described in and who executed the foregoing instrument, and acknowledged to me that they executed the same freely for the uses and purposes therein mentioned.

“In witness whereof I have hereunto set my hand and seal the day and year last above written.

“E. C. MINOR,

“Notary Public for Oregon.”

A demurrer to the original complaint having been sustained, an amended complaint was filed alleging the giving of the note set out by copy, and making the following statement:

“And that at the time the said note was executed, and subsequent to the date of its execution, the said defendants Chester A. Smith and Otis S. Smith orally promised and agreed to pay the said interest provided for in said note yearly, that is, to pay the interest on the principal sum of said note on or about the second day of January of each year, after the time of the execution of said note, but that the scrivener who drew up the said note neglected to state in said note that the interest made payable thereby should be paid annually; that at the time of the execution of said note it was and now is the custom to pay the interest on promissory notes annually when the time of payment of said note is not stated in said note, and the said custom was known to the plaintiff and the defendants at the time of the execution of said note.”

The execution of the mortgage is averred and a complete transcript of it is written into the amended complaint. Concerning the acknowledgment this averment appears:

“That at the time of the execution of said note and mortgage the said E. C. Minor, who acknowledged the same as notary public, erroneously inserted in the acknowledgment of said mortgage the names of Samuel H. Smith and Adora L. Smith, wife of said Samuel H. Smith, in place and in stead of the names of the makers of said mortgage, and that the insertion of said names of said Samuel H. Smith and Adora L. Smith was through the error, inadvertence and mistake of said E. C. Minor, and that the said defendants Chester A. Smith and Otis S. Smith were present at the execution thereof, and in the presence of said notary public acknowledged the execution of said document, and that it was the intention of said scrivener or notary public to insert the names of said Chester A.

Smith and Otis S. Smith in the said acknowledgment instead of the names of said Samuel H. Smith and Adora L. Smith.”

About the defendant Sabin the complaint says:

“That subsequent to the date of the execution of said mortgage, to wit, on or about the — day of May, 1914, the said mortgagors were declared bankrupt, and thereafter, and on or about the twenty-eighth day of May, 1914, the said R. L. Sabin, one of the defendants herein, was elected by the creditors of said mortgagors trustee in bankruptcy for said mortgagors, and said defendant has qualified as such trustee.”

On the ground that the interest had not been paid annually, the plaintiff prays for a correction of the note and mortgage and for a decree foreclosing the latter as corrected with personal judgment against the makers of the note for the principal and interest, and \$175 attorneys' fees. The defendant Sabin, as trustee in bankruptcy, demurred to this amended complaint on the ground that it does not state facts sufficient to constitute a cause of action; that the note set forth in the complaint shows upon its face that the same is not due, and nothing is pleaded to modify or change the rule that a written instrument cannot be varied by parol evidence; that the mortgage copied at large into the plaintiff's pleading is not valid as against the trustee, the same showing upon its face that it was not acknowledged by the makers thereof as prescribed by law; and that the complaint does not show that permission of the District Court of the United States for the District of Oregon was obtained before suit was instituted against Sabin, who was an officer of such court. This demurrer was overruled. Subsequently, upon leave obtained, there was filed what was denominated a supplemental complaint, but

which was precisely like the former one, except that it stated in substance that about April 21, 1913, Otis Smith had conveyed to Chester Smith the interest of the former in the real property mortgaged, and that for the unpaid balance of the purchase price in that sale Otis had filed his claim against the estate of Chester, a bankrupt, upon which the defendant Sabin, as trustee in bankruptcy, had paid a dividend of 3 per cent. The Smiths made no appearance at any stage of the litigation. The defendant Sabin demurred to this complaint, but, without passing upon the same, the court entered a decree against all the defendants for want of an answer, correcting the note and mortgage as prayed for in the complaint, and foreclosing the same. From this decree the defendant Sabin, as trustee in bankruptcy, appeals.

This case comes to us to test the validity of the complaint as against a demurrer to the same. In such a state of the pleadings the rule of construction is that the allegations of the complaint are to be taken most strongly against the pleader; for the validity of his statement is challenged at the outset while there is yet opportunity for him to amend. Concerning the alleged mistake in the note, we observe that it is said that the makers thereof orally promised and agreed to pay the interest annually, but that the scrivener who drew up that instrument neglected to state that provision therein. On its face the pleading avers two separate agreements, one written in the note, and the other expressed orally by the makers. It is not stated that they intended or agreed that this latter stipulation should be included in the note. There is no allegation anywhere in the complaint indicating in the least that the alleged mistake was mutual between the parties or that it occurred through the inadvertence

of the plaintiff and the fraud or deceit of the makers of the note. Neither is it claimed that the alleged mistake occurred without the fault or negligence of the plaintiff. The precept for pleading in such cases has been settled by a long line of authorities in this state. It is thus laid down by Mr. Justice MOORE in *Hughey v. Smith*, 65 Or. 323 (133 Pac. 68):

“The rule is settled in this state that, in a suit to reform a written instrument on the ground of misapprehension of the facts involved, the complaint must distinctly allege what the original agreement of the parties was, or point out with clearness and precision wherein there was a misunderstanding, and that such mistake was mutual and did not arise from the gross negligence of the plaintiff, or that his misconception originated in the fraud of the defendant.”

See *Evarts v. Steger*, 5 Or. 147; *Lewis v. Lewis*, 5 Or. 169; *Stephens v. Murton*, 6 Or. 193; *McCoy v. Bayley*, 8 Or. 196; *Foster v. Schmeer*, 15 Or. 363 (15 Pac. 626); *Hyland v. Hyland*, 19 Or. 51 (23 Pac. 811); *Meier v. Kelly*, 20 Or. 86 (25 Pac. 73); *Epstein v. State Ins. Co.*, 21 Or. 179 (27 Pac. 1045); *Kleinsorge v. Rohse*, 25 Or. 51 (34 Pac. 874); *Osborn v. Ketchum*, 25 Or. 352 (35 Pac. 972); *Thornton v. Krimbel*, 28 Or. 271 (42 Pac. 995); *Mitchell v. Holman*, 30 Or. 280 (47 Pac. 616); *Sellwood v. Henneman*, 36 Or. 575 (60 Pac. 12); *Stein v. Phillips*, 47 Or. 545 (84 Pac. 793); *Bower v. Bowser*, 49 Or. 182 (88 Pac. 1104); *Smith v. Interior Warehouse Co.*, 51 Or. 578 (94 Pac. 508, 95 Pac. 499); *Howard v. Tettelbaum*, 61 Or. 144 (120 Pac. 373).

It is also declared in the same substance in *Suksdorf v. Spokane, P. & S. Ry. Co.*, 72 Or. 398 (143 Pac. 1104).

The allegation of the custom to pay interest annually on promissory notes does not help the matter,

because custom, while used as a rule of interpretation, can neither add to nor take from the express terms of a contract: Section 727, L. O. L., subd. 12; *McCulsky v. Klosterman*, 20 Or. 108 (25 Pac. 366, 10 L. R. A. 785); *Holmes v. Whitaker*, 23 Or. 319 (31 Pac. 705); *Savage v. Salem Mills Co.*, 48 Or. 1 (85 Pac. 69, 10 Ann. Cas. 1065, note); *Barnard v. Houser*, 68 Or. 240 (137 Pac. 227); *Oregon Fisheries Co. v. Elmore Packing Co.*, 69 Or. 340 (138 Pac. 862). Moreover, the allegation makes the usage depend upon the fact that no time of payment of the note is stated, but the very note itself would take it out of this alleged custom, because there it is prescribed that it must be paid five years after its date. The oral agreement mentioned cannot be taken as part of the written agreement, for this would violate Section 713, L. O. L., saying:

“When the terms of an agreement have been reduced to writing by the parties, it is to be considered as containing all those terms, and therefore there can be, between the parties and their representatives or successors in interest, no evidence of the terms of the agreement, other than the contents of the writing, except * * where a mistake or imperfection of the writing is put in issue by the pleadings.”

As we have shown by the authority of *Hughey v. Smith*, 65 Or. 323 (133 Pac. 68), the statements of the complaint are not sufficient to raise the issue of mistake. The agreement of the Smiths made subsequent to the execution of the note to pay the interest annually cannot affect the case, because there is no consideration pleaded, for the subsequent agreement, and the mortgage does not purport to secure anything but the note. It does not assure the performance of the alleged oral agreement, whether contemporaneous with

or subsequent to the execution of the written promise to pay.

As to the alleged mistake in the acknowledgment of the mortgage, it is sufficient to say that, if Samuel H. Smith and Adora L. Smith, his wife, were indeed the identical persons described in and who executed the mortgage as the notary certifies, then the interest of Chester A. and Otis S. Smith was not affected by the mortgage. On the other hand, if Chester A. and Otis S. Smith were really the persons who executed the instrument, then is the acknowledgment insufficient to authorize the recording of the mortgage so as to charge the trustee in bankruptcy with notice of its contents. There are many cases where a mere clerical error in the spelling of a name has been disregarded by the court in construing the acknowledgment. Such a case is *Rodes v. St. Anthony & Dakota Elevator Co.*, 49 Minn. 370 (52 N. W. 27), where the maker of the mortgage was "Wm. Schrieber" and the certificate of the acknowledgment alluded to him as "Wm. Strieber," whom the notary declared "to be the person above named." In *Paxton v. Ross*, 89 Iowa, 661 (57 N. W. 428), there was a deed to "M. Thompson, of Washington City, D. C." The next conveyance in chain of title was from "Michael Thompson, widower, now of Honolulu, Sandwich Islands." It was signed "M. Thompson." The certificate of acknowledgment referred to him as "Michael Thompson," known by the officer to be the person who executed the deed. These differences were disregarded by the court in construing the effect of the conveyances. Many other such cases might be cited; but others, like *Boothroyd v. Engles*, 23 Mich. 19, *Stephens v. Motl*, 81 Tex. 115 (16 S. W. 731), *Carleton v. Lombardi*, 81 Tex. 355 (16 S. W. 1081), *Heil v. Redden*, 38 Kan. 255 (16 Pac. 743),

and *Powers v. Hatter*, 152 Ala. 636 (44 South. 859), hold that, where the name in the acknowledgment is entirely different from that signed to the deed to be authenticated, the instrument is not entitled to record. This seems to be the view taken by the pleader in the instant case; for she counts upon it as a mistake, and seeks to have it corrected. To hold that the acknowledgment was sufficient to entitle the mortgage to record would be making a better case for the plaintiff than she makes for herself.

In cases such as *Larson v. Elsner*, 93 Minn. 303 (101 N. W. 307, 2 Ann. Cas. 989), *Wilcoxon v. Osborn*, 77 Mo. 621, and *Milner v. Nelson*, 86 Iowa, 452 (53 N. W. 405, 41 Am. St. Rep. 506, 19 L. R. A. 279), cited in support of the acknowledgment in question, the name of the grantor was left blank in the certificate, but in each instance the officer certified that "personally appeared before me —, to me personally known to be the identical person described in and who executed the foregoing instrument, and acknowledged that he executed the same for the purpose therein named," or employed words substantially the same. These were held good on the principle that the officer certifies that someone described, not by name, but as the person who executed the deed, appeared and acknowledged the execution. There are other cases like *Smith v. Hunt*, 13 Ohio, 260 (42 Am. Dec. 201), *Stanton v. Button*, 2 Conn. 527, and *Hayden v. Westcott*, 11 Conn. 129, where the certificate recited substantially that "Personally appeared — and acknowledged that he did sign," where the acknowledgment was deemed bad because it did not appear who had executed or acknowledged the instrument. The acknowledgment was held void in *Buell v. Irwin*, 24 Mich. 145, where the certificate recited that "personally appeared be-

fore me I. D., to me known to be the person described in and who executed the above deed, and acknowledged that — executed the said deed"; it not appearing who had acknowledged or executed the same. Much reliance is placed upon the case of *Pickett v. Doe*, 5 Smedes & M. (Miss.) 470 (43 Am. Dec. 523). There a sheriff's deed signed "A. G. Harrison, Sheriff," had appended to it this certificate, omitting the venue:

"Personally appeared before me, George Crockett, clerk of the probate court in and for said county, whose name is subscribed to the within deed, as such, who acknowledged that he signed, sealed, and delivered the same, as his act and deed, on the day and year therein mentioned, and for the purposes therein contained. Witness my hand and seal of office this 3d day of August, 1841.

"[Signed] GEORGE CROCKETT, Clerk."

It will be noted that the acknowledging officer put his own name into the blank which should have been filled with the name of the sheriff. This deed was issued in pursuance of a sale under a judgment against one Ratliff, dated February 24, 1838, and was offered in evidence by the plaintiff in ejectment in support of his claim. He also read in evidence another deed for the same land by the sheriff under an execution on a judgment against a defendant named Hawley rendered November 25, 1836, which was properly acknowledged. In discussing the quoted certificate the court merely said:

"It is believed that the certificate of the clerk is very nearly, if not entirely, to the effect required. But suppose it should be insufficient; does that alter the case? The land claimed was purchased by the Planters Bank, under two different executions, and separate deeds taken, and if either be good, it is sufficient."

The opinion proceeds to show that the Hawley deed was sufficient to pass title, and affirmed the judgment for plaintiff on that ground. Although the syllabus of the case would indicate that the court held the quoted certificate sufficient, yet it is not sustained by the opinion itself. The case is not an authority for the validity of such an acknowledgment. The case of *Carpenter v. Dexter*, 8 Wall. 513 (19 L. Ed. 426), is not applicable here. There the statute required that the grantor should be known to the officer taking the acknowledgment, and that the fact should be recited in the certificate. There was appended to the deed in question proof by the affidavit of a subscribing witness of its execution. This was sworn to before the other witness. All this, taken in connection with a curative statute, was held to validate the deed. Another case relied upon by Mr. Justice BEAN is *Rodes v. St. Anthony & Dak. Elevator Co.*, 49 Minn. 370 (52 N. W. 27). There a chattel mortgage was executed by "Wm. Schrieber." The certificate referred to him as "Wm. Strieber," known to the officer "to be the person above named." The court held that as between the parties this was sufficient to pass the title. But the case was made to depend upon *Rogers v. Manley*, 46 Minn. 403 (49 N. W. 194), where the issue was whether a certain deed was a forgery. In deciding this question of fact the court considered the name of the grantor in the body of the deed and in the certificate, "Charles Y. Rogers," as circumstantial evidence, when taken in connection with other occurrences, that that individual wrote the name "Charles F. Rogers" as signature to the deed. The question of the acknowledgment being sufficient to entitle the deed to record was not considered. *Bird v. McClelland* (C. C.), 45 Fed. 458, went off on the principle

that, where a clerk of the Circuit Court was *ex-officio* clerk of a certain special court in which it was proper to acknowledge deeds, and the officer taking the acknowledgment styled himself as above, and said that the "grantor appeared in said court," it meant the court in which such a procedure was proper. *Touchard v. Crow*, 20 Cal. 150 (81 Am. Dec. 108), holds that under a statute allowing a clerk of a court of record to take acknowledgments, his deputy signing as such without using the name of his principal may also take the acknowledgment. This court ruled differently on a like question in *Dennison v. Story*, 1 Or. 272, holding that a return signed "A. S. Crabb, Deputy Sheriff," not disclosing his superior, was insufficient. *Wilson v. Russell*, 4 Dak. 376 (31 N. W. 645), merely decides that a deputy sheriff executing a deed in the name of his principal may acknowledge it as the act of the latter.

International Kaolin Co. v. Vause, 55 Fla. 641 (46 South. 3), relates to the acknowledgment of a deed by the corporation's president, under a special statute of that state. *Summer v. Mitchell*, 29 Fla. 179 (10 South. 562, 30 Am. St. Rep. 106, 14 L. R. A. 815), treats of the abbreviation of the officer's title. The decision was referable to the principle that the court will take judicial notice of "the true significance of all English words and phrases and all legal expressions": Section 729, L. O. L.; 16 Cyc. 875. *Rackleff v. Norton*, 19 Me. 274, was a case in which the acknowledgment is not quoted, but the objection was that no venue was laid. The court held that this was not required, and that, the authority of the officer being conceded, it would be presumed that he acted where he had a right to act. *King v. Merritt*, 67 Mich. 194 (34 N. W. 689), disclosed that the certificate stated that the wife ac-

knowledge that she executed the deed "with fear or compulsion of any person," using the word "with" instead of "without." The court held the deed sufficient to convey title as against the grantors. Whether the acknowledgment was sufficient to entitle the instrument to record, and thus impart constructive notice to the creditors of the grantor, was not considered by the court. In *Hughes v. Morris*, 110 Mo. 306 (19 S. W. 481), the instrument in question recited "that the undersigned J. C. Mason and O. A. Barron, composing the firm of J. C. Mason & Co.," do sell, etc. It was signed by the firm name only, which also alone appeared in the certificate of acknowledgment. The Supreme Court held it void as against attaching creditors. How this precedent sustains the acknowledgment involved in the instant case is not apparent. Again, *Graham v. Whitely*, 26 N. J. Law (2 Dutch.), 254, holds that under the statute of New Jersey a conveyance of land in that state could not be acknowledged in another state, unless the grantor resided in the latter and held a deed thus acknowledged void as to all grantors whose residence was not shown to be in the foreign jurisdiction. It is not believed that this case sustains the certificate which we are considering. In *Bauer v. Schmelcher*, 5 N. Y. Supp. 423, a widow, devisee of some realty under her deceased husband's will, conveyed the same. No executor or administrator had been appointed, although the surrogate had admitted the will to probate. She was described in the conveyance by her name and as "executrix and devisee" of the will. In terms, the deed was sufficient to convey her estate. She signed it in her individual name only without the addition of "executrix." The court held that, as she acknowledged the execution of the conveyance not only as

executrix, but also "for the purposes therein named," it was sufficient to pass the title she had as an individual. The words "executrix and devisee" were properly to be rejected as merely descriptive of the person, having no more effect than if she had written after her name "widow" or "dressmaker" or "housekeeper." In *Beckel v. Petticrew*, 6 Ohio St. 247, the blank for the venue in the form of certificate was not filled; but the officer recited that he was a "justice of the peace in and for said county," and, as the name of the county appeared in the body of the mortgage, it was held sufficient. *Estate of Dahlem*, 175 Pa. 454 (34 Atl. 807, 52 Am. St. Rep. 848), was a case where the blank for the date of the acknowledgment was not filled, but the mortgage itself was dated, and it was recorded the same day. The court presumed the acknowledgment was also taken on that day. *Love's Lessee v. Shields*, 3 Yerg. (Tenn.) 405, was where there was indorsed on the deed this writing:

"State of Tennessee, Greene County.

"January Sessions, 1807, Tuesday, 27th.

"Then was the execution of the within conveyance duly acknowledged in open court by Seymour Catching, the grantor therein named, and admitted to record. Let it be registered.

"Teste: VAL. SEVIER, Clerk."

The objection was that neither the name of the grantor nor the quantity of land appeared in the certificate quoted. The court held, however, that these faults were cured by reference to the deed upon which it was indorsed. This case is criticised by the same court in *Yerger v. Young*, 9 Yerg. (Tenn.) 38, showing it not to be in accord with the current of authority. It is not applicable to the present contention. *Blake v. Hollandsworth*, 71 W. Va. 387 (76 S. E. 814, 43

L. R. A. (N. S.) 714), holds that, where there are two certificates of acknowledgment indorsed on the same deed, one for the husband and the other for the wife, taken on the same date before the same officer, the official capacity of the officer not being written after his signature to the former, it may be cured by reference to the latter which he signed properly, adding the title of his office. The court held it good as against the grantor, but whether it was entitled to record as constructive notice to creditors was not considered. *Shelton v. Aultman & Taylor Co.*, 82 Ala. 315 (8 South. 232), holds that, in the absence of fraud or imposition where a wife signed a mortgage using the name of "S. E. Shelton," and the officer used the same name in a certificate of acknowledgment otherwise regular, she cannot impeach the certificate by showing that her true name is "Lucinda E. Shelton."

There is no objection to the doctrine that we may look to the whole deed in construing its validity whether of execution or acknowledgment. The principle is that one part may aid, but not dispute the other. This, however, does not support the acknowledgment in question. Instead of being aided by reference to the body of the mortgage it is contradicted. If we are to believe the officer's certificate, it appears that the names of two single men have been appended to a deed by a man and his wife who then acknowledge it as their own act, and not that of those named as grantors. If, indeed, as the officer's statement says, the married couple did execute the mortgage, it cannot bind the estate of the bankrupts without further showing of authority, as by power of attorney or the like. On the other hand, if the bankrupts in fact signed the mortgage, then the acknowledgment is manifestly untrue, and does not entitle the instrument

to record. In either case the trustee in bankruptcy is not affected in the absence of actual notice of the execution of the mortgage by his bankrupts. To uphold the certificate is tantamount to saying that Jones can acknowledge as his own a deed purporting to be that of Brown so as to bind the latter and furnish record notice to his creditors.

If the allegations of the complaint were sufficient to authorize the correction of a mutual error, the plaintiff might obtain relief under the doctrine of *Meier v. Kelly*, 22 Or. 136 (29 Pac. 265), where it is held thus:

“A judgment lien attaches only to the actual, and not to the apparent, interest of the judgment debtor in land, and is subject to any equitable estate therein hostile to the judgment debtor existing at the time the judgment was rendered, whether known to the judgment creditor or not; and for the purpose of protecting such equitable estate, courts of equity will correct a mistake in a mortgage upon which the equitable estate depends, and, as corrected, give it priority over a subsequently acquired judgment, so that the judgment lien will be confined to the actual interest of the judgment debtor in the land.”

The national bankrupt law provides that:

Trustees in bankruptcy, “as to all property in the custody or coming into the custody of the bankruptcy court, shall be deemed vested with all the rights, remedies, and powers of a creditor holding a lien by legal or equitable proceedings thereon”: U. S. Comp. Stats. Supp. 1911, p. 1500 (U. S. Comp. Stats. 1913, § 9631).

In Section 70, on page 1511 of the same compilation (U. S. Comp. Stats. 1913, § 9654), it is provided that the trustee of the estate of a bankrupt, upon his appointment and qualification, shall be vested by operation of law with the title of the bankrupt, as of the

date he was adjudged a bankrupt, except as to exempt property, to all property which prior to the filing of the petition he could by any means have transferred or might have been levied upon or sold under judicial process against him. It thus appears, according to the national legislation, that immediately upon the qualification of the defendant Sabin as trustee in bankruptcy of the Smiths, so far as the complaint discloses, he at once became the owner of the equity of redemption in the realty described in the mortgage sought to be foreclosed. From that time on it was in the custody of the bankruptcy court within the meaning of the act of Congress. As holder of this estate in the land the trustee may rightly resist the premature foreclosure of the mortgage. He was entitled to withstand the visitation upon his estate of the expenses of foreclosure and the amount of attorneys' fees charged in the complaint. By that much would the estate of his bankrupt be lessened unnecessarily and prematurely. It is possible that the estate may be sufficient to pay in full all claims against the same, including the mortgage in question without resort to foreclosure; hence he has standing to object to the present suit. That the pleading is insufficient to authorize a correction of the alleged mistake is clearly demonstrated by the case of *Hughey v. Smith*, 65 Or. 323 (133 Pac. 68), and the demurrer should have been sustained. The so-called supplemental complaint is not in any sense such a document. All its contents could have been stated in either of the previous declarations of the plaintiff. It is merely a second amended complaint. In addition to the objection being well taken to this last complaint, it was error to proceed to judgment and decree without deciding the issue of law thus ten-

dered. It was an error to overrule the demurrer to the second complaint.

For these reasons, I dissent from the opinion of Mr. Justice BEAN in respect to the sufficiency of the acknowledgment of the execution of the mortgage in question.

Argued September 5, affirmed September 26, rehearing denied October 24, 1916.

FOREMAN v. SCHOOL DISTRICT NO. 25.

(159 Pac. 1155, 1168.)

Schools and School Districts—Teachers—Discharge—Statute — “But.”

1. Laws of 1913, page 304, Section 1, subdivision 22, provides that the board shall dismiss teachers only for good cause shown, and if it passes an order to dismiss, the material reason therefor shall be spread on the record by the district clerk. Subdivision 23 provides that a teacher unjustly dismissed may take an appeal from the board's action to the county superintendent, and thence to the superintendent of public instruction, but for a breach of contract of teaching the teacher or the district shall have their ordinary legal remedies, and that on the trial of a teacher the board, etc., shall give him notice of charges and an opportunity to be heard; and subdivision 7 requires a written contract of hiring to be made and filed specifying wages, etc. Section 3950, L. O. L., authorizes the state board of education to make general rules, one of which required teachers to inculcate correct principles of morality and a proper regard for the government, and Section 4057 required the board to provide a United States flag. Plaintiff, having a written contract to teach, and who taught disloyalty to the government and a disbelief in God, and who failed to fly the national flag provided by the board, after a refusal to obey the school directors' instructions, was dismissed. *Held*, in her action for salary under the contract, that the term “but for a breach of contract of teaching the teacher or the district shall have their ordinary legal remedies” did not limit the power to dismiss to breaches of the contract of teaching, and that it extended also to acts rendering a teacher undesirable; the word “but” limiting or restraining the effect of something which has before been said, and indicating that what follows is an exception to that which has gone before, and not controlling that which follows it.

Schools and School Districts—Teachers—Dismissal—Notice.

2. Under such subdivision 22, a minute of dismissal having been made upon a piece of paper, the board action was not defeated, where it was so made because its clerk was sick, on which account it was not entered in the district clerk's record-book.

[As to authority, duties, liabilities and powers of school teachers, see notes in 76 Am. Dec. 164; 102 Am. St. Rep. 507.]

Appeal and Error—Reversal—Constitutional Provision.

3. Where the jury made no mistake in returning a verdict for the school district in a teacher's action for a balance due under a teaching contract, the judgment will be affirmed as required by Article VII, Section 3 of the Constitution, as amended, notwithstanding any errors that may have been committed during the trial.

From Columbia: JAMES A. EAKIN, Judge.

Department 1. Statement by MR. JUSTICE HARRIS.

This is an action by Flora I. Foreman against School District No. 25, of Columbia County, Oregon.

The plaintiff and the directors of school district No. 25 of Columbia County agreed in writing "that the said Flora I. Foreman is to teach the public school of district No. 25 for the time of eight months" for \$85 per month, "commencing on the first day of September, 1913, and for such services lawfully and properly rendered the directors of said district are to pay to said Flora I. Foreman the amount that may be due according to this contract, on or before the eighth day of May, 1914." After the plaintiff had taught about two months charges against her were filed with the school board, but she was exonerated after a hearing. Some of the patrons of the school were dissatisfied, and caused a recall election to be held on March 21, 1914, for the purpose of unseating some of the directors. Immediately after the election a meeting of the directors was held, and "it was voted to go to the schoolhouse in a body Monday, the 23d of March, and give rulings and instructions to the teachers in regard to their conduct, and it was also decided that, if they do not promise to obey, to give them five days in which to resign." The plaintiff refused to obey the "rulings and instructions" which the directors attempted to give, and because of such refusal she was notified in writing that her contract "has been and is

canceled and abrogated to take effect from and after Friday, March 27, 1914." The plaintiff presented herself at the schoolhouse on Monday, March 30th, but the directors refused to permit her to continue teaching. The plaintiff was paid in full for the first seven months provided for in the contract, and she is now attempting to recover \$85, which is the amount she would have received if she had been permitted to teach until the end of the period specified in the contract. The complaint recites the contract, alleges that the plaintiff taught seven months, but was then wrongfully dismissed, and not permitted to teach the eighth month, and concludes with a demand for a judgment for \$85.

The answer admits that the teacher was dismissed, and explains the dismissal by alleging that the plaintiff taught her pupils "principles of anarchy and disloyalty to their government, among other things, that the government under which she and they live 'is rotten to the core'"; that she also taught her pupils "that there is no God, and that Jesus Christ is not the Son of God; and that the plaintiff during the entire seven months that she taught under her contract set forth in her complaint performed such services as she rendered in an unlawful and improper manner and in such a way as to disrupt the school and the entire community—which several and many acts of misconduct on her part resulted in numerous and frequent breaches of her contract on her part and made it necessary and the duty of the defendant school board to discharge the plaintiff as such teacher."

A jury trial resulted in a judgment for the defendant, and the plaintiff has appealed.

AFFIRMED. REHEARING DENIED.

For appellant there was a brief and an oral argument by *Mr. Albert Streiff*.

For respondent there was a brief and an oral argument by *Mr. Glenn R. Metsker*.

MR. JUSTICE HARRIS delivered the opinion of the court.

1, 2. The important problem presented by this litigation arises out of two subdivisions of Section 1, Chapter 172, Laws of 1913, and for that reason both subdivisions are here set down in full:

Subdivision 22. "The board shall dismiss teachers only for good cause shown, and in case the board shall pass an order to dismiss, the material reason therefor shall be spread upon the record by the district clerk."

Subdivision 23. "If a teacher is unjustly dismissed, he may take an appeal from the action of the board in dismissing him to the county superintendent and thence to the superintendent of public instruction, but for a breach of contract of teaching the teacher or the district shall have their ordinary legal remedies. In the trial of a teacher, when it is sought to dismiss him, as above provided, the board, the county superintendent, or the state superintendent, as the case may be, shall give the teacher due and legal notice of the charges against him and an opportunity to be heard in his own defense in person or by attorney."

The plaintiff takes the position that the dismissal of a teacher is wrongful, unless (1) charges are made with notice and an opportunity for a hearing, and (2) for good cause shown; that the existence of one element alone does not justify the dismissal of a teacher; and that therefore, even though a teacher is discharged for "good cause," the dismissal is nevertheless wrong:

ful, and is not a defense unless it has been preceded by the filing of charges, the giving of notice, and an opportunity to be heard. The defendant argues, however, that if a teacher breaches any of the terms of the contract of teaching, then the school board has the power summarily to dismiss the teacher. When examining this statute to ascertain which contention is correct, it must be borne in mind all the while that, "where there are several provisions or particulars, such construction is, if possible, to be adopted as will give effect to all" (Section 715, L. O. L.), and that, "when a general and particular provision are inconsistent, the latter is paramount to the former" (Section 716, L. O. L.).

The words "but for a breach of contract of teaching the teacher or the district shall have their ordinary legal remedies," found in the first sentence of subdivision 23 of Section 1, Chapter 172, Laws of 1913, have brought about the variant contentions made by the litigants concerning the effect of the statute. If the quoted words had been omitted, then a dismissal for any cause whatsoever would be wrongful in the absence of charges, notice and an opportunity to be heard: *School Dist. v. McComb*, 18 Colo. 240 (32 Pac. 424); *Hull v. Independent Dist. of Aplington*, 82 Iowa, 686 (46 N. W. 1053, 48 N. W. 82, 10 L. R. A. 273); *People ex rel. v. Board of Education*, 174 N. Y. 169 (66 N. E. 674); *Kellison v. School Dist.*, 20 Mont. 153 (50 Pac. 421); *Butcher v. Charles*, 95 Tenn. 532 (32 S. W. 631); *Arnold v. School Dist.*, 78 Mo. 226; *Richards v. School Dist. Board*, 78 Or. 621 (153 Pac. 482, L. R. A. 1916C, 789). The language employed by the statute is broad and sweeping, and includes more than mere breaches of the contract of teaching. The words "but for a breach of contract of teaching the teacher or the dis-

strict shall have their ordinary legal remedies'' of necessity imply that the power to dismiss is not limited to breaches of the contract of teaching; and therefore the statute includes delinquencies which may with propriety be divided into two classes: (1) Acts which breach the contract of teaching; and (2) acts which render a person objectionable or undesirable as a teacher, although the contract of teaching is not breached.

When the school board hires a teacher, a written contract must be made and filed specifying "the wages, number of months to be taught, and time employment is to begin, as agreed upon by the parties," and, "unless otherwise provided in the teacher's contract, it shall be understood that the branches provided for in the state course for the first eight grades shall be taught excepting school law and theory and practice of teaching": Subdivision 7, Section 1, Chapter 172, Laws 1913. The state board of education, in the exercise of the powers conferred upon it by Section 3950, L. O. L., among other rules and regulations for the general government of public schools, has prescribed rule XXX which commands that "teachers in the public schools shall, to the utmost of their ability, inculcate in the minds of their pupils correct principles of morality, and a proper regard for the laws of society, and for the government under which they live": Oregon School Laws 1913, Compiled by J. A. Churchill, Superintendent of Public Instruction, p. 171. The contract of teaching is made with reference to the provisions of the statute, so that the contractual obligations of the teacher are not necessarily limited to the words found in the written contract, and therefore the contract of teaching includes not only the duties enumerated by the written paper,

which for convenience is called the contract, but it also embraces those duties which are imposed under a then existing statute; and if the teacher breaches this contract of teaching, one of the ordinary legal remedies available to the school board, unless some statute declares to the contrary, would be found in the right summarily to discharge the teacher: 26 Cyc. 987.

Assuming, but not deciding, that moral misconduct outside the schoolroom will generally of itself be sufficient to terminate the contract of teaching (26 Cyc. 990), it would nevertheless not be difficult to go further and suggest many acts which, when done outside the schoolroom by the individual, as distinguished from the teacher, would not constitute a breach of the contract of teaching, and yet would be so objectionable that the individual might no longer be desirable as a teacher. For the misconduct of the teacher as such there always has been a legal remedy, but generally for what is done by the individual outside the schoolroom not amounting to a breach of the contract there is ordinarily no legal remedy in the absence of legislation. For the purpose of protecting the public schools, the power to dismiss has therefore been enlarged, and at the same time, for the purpose of protecting the teacher, a mode has been prescribed for the exercise of the enlarged power, so that the school district now has a remedy for a class of misdoings where before no relief was ordinarily available, and the teacher is at the same time afforded ample protection; and consequently an act may now be "good cause" for a dismissal under the statute notwithstanding no legal remedy existed before the statute. Having in mind the two classes of delinquencies, the rights arising out of them, and the remedies existing or created for them, and following the guidance offered

by Sections 715 and 716, L. O. L., the statute should be construed to mean that charges must be made and notice and an opportunity for a hearing given, before a teacher can be discharged for an act which does not amount to a breach of the contract of teaching; but for a breach of the contract of teaching the teacher may be dismissed summarily without a hearing because for that breach, in the words of the statute itself, the board shall have the "ordinary legal remedies," and the right of summary dismissal was ordinarily a legal remedy which was available before the statute was enacted.

Text-writers and precedents also support this conclusion. When the word "but" is used as an adversative conjunction, and is employed to fill the position where it is found in the first sentence of subdivision 23 of the statute, the term may limit or restrain the effect of something which has before been said and to indicate that what follows is an exception to that which has gone before (1 Words and Phrases, 926; 1 Words and Phrases (2 ser.), 540; 6 Cyc. 261; *Mansfield v. Hill*, 56 Or. 400, 411 (107 Pac. 471, 108 Pac. 1007); and therefore what is said before the word "but" does not control that which follows it: *Western Union Tel. Co. v. Harris* (Tenn. Ch. App.), 52 S. W. 748.

The conclusion already announced is still further fortified if the examination of the statute is continued. Limiting our view to subdivisions 22 and 23, it will be seen that no mention is made of an appeal by the board or the person making charges against a teacher. Assume that a teacher cannot be dismissed for a breach of the contract of teaching without a hearing, and suppose that after a hearing the board dismisses the teacher, but upon appeal the county superintend-

ent reverses the finding made by the board; then what effect does the finding of the county superintendent have? Can the school board appeal? Subdivision 23 does not say so, although it does permit the teacher to appeal. Does the finding of the county superintendent bind the school board if in truth the teacher has breached the contract, when no appeal by the board is mentioned, and the statute expressly states that for a breach of the contract both the teacher and the board shall have their ordinary legal remedies? The ordinary legal remedy for a breach of a contract of hiring is to discharge the person hired, and the hirer can utterly defeat an action for damages, by pleading and proving the breach and the dismissal.

The plaintiff contends that the board could not dismiss her unless the reason for the dismissal is spread upon the record by the district clerk as required by subdivision 22. Before notifying the plaintiff of the termination of the contract of teaching, the directors held a meeting and duly ordered the dismissal, and, according to the testimony of one of the directors:

“That minute was made on different paper because our clerk was sick, and she wasn’t fit to be up, and Mr. Joe Lumijarvi wrote down the minutes.”

If a minute of the dismissal was actually made upon a piece of paper, the plaintiff cannot defeat the action of the board merely because the clerk was sick, and on that account the minutes of the meeting were written on a piece of paper instead of in the district clerk’s record-book.

It is not necessary to determine just what acts of misconduct on the part of the teacher or by the individual as distinguished from the teacher constitute a breach of the contract of teaching, because a breach of the contract was shown by the submission of ample

evidence in support of the allegation that the plaintiff taught her pupils "disloyalty to their government, among other things, that the government under which she and they live 'is rotten to the core.' " A rehearsal of the evidence could only be a recital of bitter contentions and distracting disturbances. Within two months of her coming charges were made against the plaintiff. After her acquittal one of the directors resigned, and subsequently another was recalled, and on March 30th a serious disturbance occurred at the schoolhouse when the plaintiff and her followers clashed with the school directors. When the directors went to the schoolhouse on March 23d to "give rulings and instructions" to the plaintiff, she said, "I teach as I darn please." The national flag was not flown a single day while the plaintiff occupied the position of teacher, although the board had provided a United States flag in compliance with Section 4057, L. O. L.; and an index of her conduct is furnished by the testimony of one of the directors, who stated that another director told the plaintiff, "You better raise up the flag," and she says, "I won't do it; if you want the flag, you hoist it up yourself."

3. The jury made no mistake in returning a verdict for the school district, and their finding is so eminently proper that the judgment should be affirmed notwithstanding any errors that may have been committed during the trial: Article VII, Section 3, of the Constitution as amended.

The judgment is affirmed.

AFFIRMED. REHEARING DENIED.

MR. CHIEF JUSTICE MOORE, MR. JUSTICE BURNETT and MR. JUSTICE BENSON concur.

Denied October 24, 1916.

ON PETITION FOR REHEARING.

(159 Pac. 1168.)

Department 1. MR. JUSTICE BENSON delivered the opinion of the court.

In a very earnestly argued petition for rehearing, counsel for appellant urges that the original opinion herein is inconsistent with the law as announced in the case of *Richards v. School District No. 1*, 78 Or. 621 (153 Pac. 482), but a careful consideration of both opinions does not sustain the contention. The Richards Case is based upon Laws of 1913, Chapter 37, which is applicable only to districts having a population of 20,000 or more persons, while the case at bar is controlled entirely by the provisions of Chapter 172, Laws of 1913. The distinction between the two acts is so clear, and the exposition of the law as expressed in Chapter 172 so explicitly stated in the former opinion herein, as to require no further discussion. The vast difference in the facts of the two cases only emphasizes the correctness of the conclusion heretofore reached.

Petition for rehearing is denied.

REHEARING DENIED.

Argued September 20, affirmed October 24, 1916.

MAGNESS v. DITMARS.

(160 Pac. 527.)

Deeds—"Mental Capacity."

1. "Mental capacity" at the time of signing a conveyance sufficient to comprehend the nature of the business in which the grantor is engaged is the standard fixed by the law for determining his competency.

Deeds—Competency of Grantor—Sufficiency of Evidence.

2. In suit involving the validity of a deed executed by defendant's father, evidence held to show that at the time of execution the father was mentally competent, knowing the nature of the business in which he was engaged, and fully understanding its effect.

[As to validity of deed of insane person executed before adjudication of insanity, see note in Ann. Cas. 1914D, 867.]

From Yamhill: WEBSTER HOLMES, Judge.

Department 1. Statement by MR. JUSTICE HARRIS.

This is a suit by R. N. Magness against Hattie M. Ditmars, by Tillie Ditmars Kirkwood, general guardian of her person and estate, and Tillie Ditmars Kirkwood, as guardian *ad litem* of Hattie M. Ditmars. The facts are as follows:

John A. Ditmars and his wife, Tillie Ditmars, on July 19, 1899, deeded to James H. Shipley 80 acres of land, together with "a suitable right of way across the premises of" the grantors to the Dayton and Salem County road. This suit involves the validity of that deed. The plaintiff purchased the land from James H. Shipley, and alleges that John A. Ditmars was sane while the defendants claim that he was insane and not competent to execute the deed. John A. Ditmars was committed to the Oregon State Insane Asylum on November 15, 1897, and was detained there until February 26, 1898, when he was released "upon six months' leave of absence." He returned to his

farm, where he continued to reside with his wife; and afterward the asylum authorities made an entry in their records showing that he was discharged October 5, 1898, as cured.

At the time of his commitment to the insane asylum John A. Ditmars owned a farm which embraced 253 acres of land, including the 80 acres involved in this suit. He paid \$1,000 on July 24, 1897, for 57 acres; he purchased the remaining 196 acres on October 12, 1897, from Damon E. Sawyer and wife for \$2,610.36, and at the same time gave a note for \$1,300 to A. J. Hunsaker and secured it by executing a mortgage on the 253 acres. The consideration for the deed to Shipley was \$1,600, of which \$600 was paid on or before the delivery of the conveyance, and Shipley and his wife gave a note to Ditmars for the remaining \$1,000 and secured it with a mortgage on the land. Shipley entered into the possession of the 80 acres soon after the delivery of the deed. He improved the land, and subsequently sold the premises with the right of way to the plaintiff, R. N. Magness, on August 20, 1906, for \$3,000. Magness has been in possession ever since he purchased the land, and he has made permanent improvements. Ditmars and wife gave a note to J. R. Forrest on October 14, 1899, for \$1,400, and secured the paper by executing a mortgage on all the land then owned by them, and two days later the mortgage held by A. J. Hunsaker was satisfied.

John A. Ditmars was taken to a private sanatorium about May 1, 1900, but at the end of about three weeks he was committed to the Oregon State Insane Asylum, where he remained until his death, which occurred on February 4, 1901. He died intestate, leaving a widow, Tillie Ditmars, and a minor child, Hattie M. Ditmars, who was born in March, 1899. Tillie Ditmars was ap-

pointed administratrix of the estate of the deceased, and she was also appointed guardian of the person and estate of the minor daughter, Hattie M. Ditmars. James H. Shipley paid the \$1,000 note which he had given to John A. Ditmars, and on December 19, 1901, the date of the payment, Tillie Ditmars, as administratrix of the estate of John A. Ditmars, duly satisfied the mortgage. Tillie Ditmars married again, and her name now is Tillie Ditmars Kirkwood. The note and mortgage from Ditmars and wife to J. R. Forrest were paid and satisfied on July 1, 1908. A dispute arose in 1911 between the Kirkwoods and Magness over the location of the right of way which had been provided for in the deed from the Ditmars to Shipley. The Kirkwoods attempted to prevent Magness from traveling over the way which had been previously used, and then on July 19, 1911, Magness commenced a suit against the minor child, her guardian, and the Kirkwoods, to enjoin them from interfering with his right to travel over the way which he had been using. The suit terminated on December 27, 1911, in a stipulated decree, which fixed the route of the way to be traveled. Afterward, in 1913, Hattie M. Ditmars, by her guardian, Tillie Ditmars Kirkwood, commenced an action in ejectment against R. N. Magness to recover the 80-acre tract which he had purchased from Shipley.

Magness answered, and then commenced this suit by filing a complaint in equity in the nature of a cross-bill and praying that the minor child be barred from claiming any interest in the land. After hearing the evidence the trial court found that John A. Ditmars was competent when he made the deed to Shipley, and decreed that Magness was the owner of the 80-acre tract and right of way. The defendant appealed.

AFFIRMED.

For appellants there was a brief over the name of *Messrs. McCain, Vinton & Burdett*, with oral arguments by *Mr. W. T. Vinton* and *Mr. James E. Burdett*.

For respondent there was a brief over the names of *Mr. Frank Holmes, Mr. Charles L. McNary* and *Mr. B. A. Kliks* with oral arguments by *Mr. McNary* and *Mr. Holmes*.

MR. JUSTICE HARRIS delivered the opinion of the court.

1. Hattie M. Ditmars asserts that the deed which John A. Ditmars and wife executed on July 19, 1899, to James H. Shipley was invalid, for the reason that her father was, at that time, mentally incompetent, and that therefore she is the owner of the land as his daughter and heir. The daughter cannot successfully claim any interest in the land unless at the time of the execution of the deed her father did not comprehend the nature of the business. Mental capacity at the time of signing a conveyance sufficient to comprehend the nature of the business in which the person is then engaged is the standard fixed by the law for determining the competency of the person signing the document: *Carnegie v. Diven*, 31 Or. 366, 369 (49 Pac. 891); *Swank v. Swank*, 37 Or. 439, 445 (61 Pac. 846); *Wade v. Northup*, 70 Or. 569, 578 (140 Pac. 451).

2. We must now look to the evidence and ascertain whether, on July 19, 1899, John A. Ditmars knew the nature of the business in which he was then engaged, and fully understood the effect of the transaction. Some years prior to 1897 he contracted a disease which in turn produced general paresis. The medical witnesses agree that paresis is incurable; and, while it inevitably causes death, the patient will ordinarily

live from two to five years. The mind is never again normal after paresis seizes its victim, and consequently complete lucidity becomes impossible. While a recovery never occurs and rationality never again becomes normal, the patient may nevertheless pass through periods of remission, lasting from several weeks to months and occasionally for a year or more, during which it may be difficult or almost impossible to discover any trace of a deviation from normal mental health, and the patient can return to his affairs. Dr. W. T. Williamson, who was 17 years a physician at the Oregon State Insane Asylum and has made a study of nervous diseases for about 28 years, when a witness for the defendant, said that he believed "a person suffering from general paresis would be able to do business more or less, and whether he was competent to do any given thing would have to rest upon the proof of his competency at the time, adduced from a series of events." Dr. L. F. Griffith, who was a witness for plaintiff, expressed the opinion that the best method to determine the mental capacity of a paretic is to ascertain "whether he was reasonable in the ordinary affairs of life, his conduct about—going about the affairs of life in an ordinary, reasonable manner." When Ditmars was received at the insane asylum in 1897 the physical signs of the disease had not yet developed, and consequently the persons in charge could not, at that time, "make the diagnosis of general paresis." At first he was in a condition of mental excitement; but when he was released on February 26, 1898, his condition was much improved, and he had returned to "a comparatively sane condition of mind" and "had already entered a remission," and, in the opinion of Dr. L. F. Griffith, who has been connected with the asylum, except one year, since 1890, and was

a member of the medical staff in 1897 and 1898, "he was capable to do ordinary things at that time." Soon after his return home he resumed the management of his farm, going about much as the ordinary person does; and, while he had "spells" which left him in a stupor on different occasions, he nevertheless continued to conduct the business of the farm until a comparatively short time before being taken to the private sanatorium in May, 1900.

James H. Shipley was a neighbor who lived "about a couple of hundred yards from" the Ditmars home. About ten days before the sale Ditmars asked Shipley if he "wouldn't like to buy a piece of land," explaining to Shipley that:

"He had a mortgage on his own place, and if he could sell that piece of land when he got that he would turn it in on his own mortgage on the farm, and it would help him out to get some tools to farm with and other things he needed on the farm at the time."

Shipley told Ditmars that he would make up his mind a little later, and the former testified that:

"The next time I met him down in the river bottom, he asked me, 'What about that trade?' and I told him we would go down the next Sunday and measure it off and look it over; so we did."

In company with another person they measured off the land "about where the line would come to." They agreed upon a price of \$1,600, which was to be on terms of \$600 cash and a note and mortgage for \$1,000. The land was not reasonably worth more than the agreed price. Ditmars said the whole farm was leased, but Shipley told him if he "could get possession, the price and terms was satisfactory." Shipley arranged with the lessee for possession of the land, and then "told Ditmars I guessed we could trade and

make the deal," and paid \$10 to apply on the purchase price. Ditmars and his wife, accompanied by Shipley and his wife, drove to McMinnville for the purpose of making a conveyance. When they arrived in town Ditmars and Shipley obtained a description of the 80-acre tract from a surveyor who had made a survey for Ditmars and an adjoining land proprietor. After obtaining a description of the land, they went to an office, where the conveyance was prepared. Ditmars and his wife signed the deed and received a check for \$590, together with a note and mortgage for \$1,000, signed by Shipley and wife. Ditmars cashed the check on the day he received it, and deposited \$500 of the amount in a bank. Both the deed and the mortgage were filed for record within two hours of the time of delivery, and the Ditmars, accompanied by the Shipleys, then returned to their homes. John A. Ditmars neither said nor did anything unusual when going to or returning from McMinnville. The notary public who witnessed the deed and took the acknowledgment of the grantors testified that Ditmars "acted in a rational manner about signing the deed and answering questions as to whether he made it of his free will and accord," and "was sane and rational and in good condition to transact business." The second witness to the deed did not notice anything unusual. Shortly before the sale Ditmars told L. A. Byrd that "he was going to sell that piece of land; that would put him out of debt, and he would have plenty of land left." John Ross worked for Ditmars, and heard him say he was going to sell. Ditmars wanted to sell the 80 acres to Thomas Collinson, but the latter could not buy because he had no money, and two or three weeks later Ditmars told him that he had sold the property, and was satisfied with the sale. Frank Ditmars said that his

brother was running his own business in 1899, and that he noticed nothing peculiar with John after he came back from the asylum until about two weeks before the second commitment. Fifteen different witnesses, who had either worked for John A. Ditmars or around him, or had bought livestock from or had sold livestock to him, testified that he was sane or competent, or that he appeared rational, or that they noticed nothing peculiar about him.

Ditmars transacted important business both before and after the execution of the deed to Shipley. On October 12, 1897, Ditmars received the Sawyer deed, and at the same time executed the Hunsaker mortgage. The notary public who witnessed and took the acknowledgment of Sawyer to the deed did not notice anything wrong with Ditmars, and the person who acted as the second witness to the Sawyer deed and who also witnessed and as notary public took the acknowledgment of Ditmars to the Hunsaker mortgage testified that:

“During this transaction, Mr. Ditmars conducted himself in a rational way. I could see nothing wrong with the man’s actions, and we talked over the business.”

The Forrest mortgage was executed by Ditmars and his wife, on October 14, 1899, and at that time, according to the testimony of M. D. L. Rhodes, who acted as notary public and as a witness to that instrument, Ditmars comprehended the business; and Judge E. V. Littlefield, who also witnessed the mortgage testified that Ditmars “was competent to transact business,” and “the question never entered my mind but what he was as sane as any man could be.” This witness knew that Ditmars had been in the asylum, and on that account it is fair to assume that

any peculiar or unusual conduct on the part of Ditmars would have been noticed.

The evidence shows that John A. Ditmars comprehended the business in which he was engaged, and understood the nature and effect of the transaction when he signed the deed. He had a good reason for selling the land; he went about the business in a reasonable manner; and he received the full market value of the land. His mentality measured up to the gauge which both medical experts applied. He possessed a sufficient understanding to meet the test fixed by the law, and the deed to Shipley was therefore valid.

Although it is not necessary to proceed further with the discussion, yet a better understanding of the surroundings may be had if we again look at the record. Some light is thrown upon the attitude of Tillie Ditmars Kirkwood and the position now taken by the defendant when it is recalled that no assault was made upon the deed until the commencement of the action in 1913 to eject Magness; and no claim was ever made, or even intimated, that Ditmars was incompetent to sign the deed until 1911, when, according to the testimony of the plaintiff, Mrs. Tillie Ditmars Kirkwood told him that:

“If I went ahead with the suit [concerning the right of way] she would bring this suit against me for the property on the grounds that Ditmars was not capable of making a deed.”

For a period of 12 years Mrs. Tillie Ditmars Kirkwood, the widow of the deceased, the administratrix of his estate and the guardian of his child, recognized the validity of the deed, not only by her failure to object, but also by her positive acts of approval. She signed the Forrest mortgage which excepted the 80 acres sold to Shipley; she affirmed the deed when she

satisfied the Shipley mortgage on December 19, 1901; she did not claim any right to the land as guardian, nor assert any interest in it as administratrix; and she acknowledged the validity of the deed when as an individual and as guardian she signed the stipulation which authorized the decree in the right of way suit for the very basis of the right to a way was the deed itself. She has never questioned the validity of the deeds conveying 253 acres to Ditmars in 1897, nor has she ever claimed that the Hunsaker and Forrest mortgages were invalid.

The decree is affirmed.

AFFIRMED.

MR. CHIEF JUSTICE MOORE, MR. JUSTICE BURNETT and MR. JUSTICE MCBRIDE concur.

Argued September 27, affirmed October 24, 1916.

BUTSON v. MISZ.*

(160 Pac. 530.)

Compromise and Settlement—Consideration—Invalid Claims.

1. Where the mortgagee and the purchaser from the mortgagor believed that the mortgage contained a clause for the payment of taxes, and the former in good faith had started foreclosure proceedings because of the failure to pay taxes, a settlement of such proceedings is sufficient consideration for a promise made by the purchaser to insure the building for the mortgagee's benefit, though in fact the mortgage contained no clause for the payment of taxes, and there was no right to foreclose, and that promise will be enforced in equity.

[As to mistake of law as annulment of compromise, see note in Ann. Cas. 1916D, 347.]

Contracts—"Consideration."

2. "Consideration" is a benefit to the party promising, or a loss or detriment to the party to whom the promise is made.

*For authorities discussing the question of rights of mortgagee to benefit of insurance taken in name of mortgagor, see note in 25 L. R. A. 305.
REPORTER.

Mortgages—Insurance—Constructive Trust.

3. Where a mortgagor is bound either by the mortgage or by a valid verbal agreement to insure the property as further security, the mortgagee is entitled to an equitable lien on the insurance money, and the proceeds when collected by the mortgagor are held in trust for the benefit of the mortgagee.

Mortgages—Agreement to Insure—Oral Agreement—Amount of Insurance.

4. An oral agreement to insure mortgaged premises, which does not state the amount to be taken out, ordinarily requires the proper amount of a policy upon the building.

Mortgages—Insurance—Right to Proceeds—Mortgagee.

5. Where an insurance policy is taken out by the mortgager, who had agreed to insure for the benefit of the mortgagee, equity will treat the policy as payable to the mortgagee as his interest may appear.

Mortgages—Insurance—Mortgagee's Right to Insurance Money.

6. Equity has jurisdiction of a suit to enforce a mortgagee's right to the proceeds of insurance on the premises, since he is entitled to have the specific fund held intact for him, and an action at law would not afford an adequate remedy.

From Multnomah: HARRY H. BELT, Judge.

Department 2. Statement by MR. JUSTICE BEAN.

This is a suit by John E. Butson against W. H. Misz and Alice M. Misz, his wife, to have the defendants declared trustees for the benefit of the plaintiff in the sum of \$700. From a decree in favor of plaintiff, defendants appeal. AFFIRMED.

For appellant there was a brief and an oral argument by *Mr. Raymond A. Sullivan*.

For respondent there was a brief with oral arguments by *Mr. George F. Brice* and *Mr. W. H. Masters*.

MR. JUSTICE BEAN delivered the opinion of the court.

The record discloses the following facts, the controverted part being amply supported by the evidence: On July 3, 1914, defendant W. H. Misz, acting in behalf

of his wife, the other defendant, purchased a tract of 5.64 acres of land, with a house and other buildings thereon, situated at Wilsonville, Clackamas County, Oregon. Upon this property the plaintiff Butson held a mortgage in the sum of \$2,500, executed April 12, 1911, by one Cook and his wife, who purchased the land from plaintiff. The mortgage was given to secure two notes, one for \$1,000, and the other for \$1,500, due thereafter in five and ten years, respectively. The Cooks conveyed the property to one Adams, who deeded the same to defendant W. H. Misz, subject to plaintiff's mortgage. Prior to the time Mr. Misz bought the land he met the plaintiff at Wilsonville and informed him he was about to trade for the property. Butson told him he would give him three days to pay the two years' delinquent taxes on the premises, and complained that the buildings had run down, and if the taxes were not so paid he would place the mortgage in the hands of his attorney for foreclosure. In about a week, the taxes not having been liquidated, plaintiff made arrangements with his attorney to foreclose the mortgage. A short time afterward Mr. Misz went to Butson and informed him that he had made the deal, but plaintiff told him he was too late; that his attorney had the matter for collection. In order that the deal might not be thwarted, negotiations were entered into to settle the controversy, pay the delinquent taxes, and stop the threatened foreclosure of the mortgage. In order to effect this adjustment, Misz agreed to pay the delinquent taxes, pay the plaintiff's attorney his charges in the matter, and take out insurance on the house in his own name, payable to Butson as mortgagee. To this plaintiff assented, and Misz paid the taxes and expenses amounting to \$48.48, and agreed to send the policy of

insurance to Butson. Plaintiff's evidence as to this contract is corroborated by his wife and attorney, and is not successfully refuted. Plaintiff afterward allowed a policy of \$200, which he had on the dwelling-house payable to himself, to lapse. The title to the property was first conveyed to Mr. Misz and afterward he deeded the same to his wife who was the equitable owner thereof. On October 8, 1914, Misz procured a policy of insurance on the dwelling-house in the sum of \$700, payable to Mrs. Misz. Butson never saw the policy, and in fact could not read nor write. He inquired of defendant about the insurance policy and was told by him that he had it all right in his safety box. Butson states that he trusted Mr. Misz in the matter. On March 29, 1915, the insured building was consumed by fire and plaintiff demanded the insurance money which defendants collected. A compromise agreement that defendants would pay plaintiff \$200 and build another house on the land was effected, but never carried out by the former, a circumstance which does not affect this suit except to explain why defendants were permitted to collect the insurance. Plaintiff's mortgage contained no covenant that the mortgagor should insure the building nor for the payment of taxes. No interest was due on the mortgage at the time Mr. Misz purchased the property.

1. It is contended on behalf of defendants that the agreement of Misz to insure the dwelling and make the policy payable to the mortgagee, if made, was not supported by any consideration, for the reason that no condition of the mortgage had been broken at the time of the contemplated foreclosure when Misz negotiated for the real estate, and that plaintiff had no right to foreclose the mortgage and no cause of suit to settle.

A compromise and settlement of a *bona fide* controversy between the parties, where each having equal knowledge or equal means of knowledge of the facts in good faith claims a right in himself against the other, and which claim the parties consider good or doubtful, constitutes a valid binding agreement, and is a sufficient consideration to support a new contract, even though the law and facts were such that a court would not have adjudged such an adjustment: *Smith v. Farra*, 21 Or. 395 (28 Pac. 241, 20 L. R. A. 115); *Thayer v. Buchanan*, 46 Or. 106, 111 (79 Pac. 343); *Roane v. Union Pac. Life Ins. Co.*, 67 Or. 264 (135 Pac. 892); *McGlynn v. Scott*, 4 N. D. 18 (58 N. W. 460). A new contract based upon such a consideration will be enforced in equity: 2 Pom. Eq. Juris. (3 ed.), § 850.

2. Consideration is defined as a benefit to the party promising or a loss or detriment to the party to whom the promise is made: 9 Cyc. 308; *Visalia Gas Co. v. Sims*, 104 Cal. 326 (37 Pac. 1042, 43 Am. St. Rep. 105).

The plaintiff in good faith claimed the right to foreclose his mortgage. Both the parties appeared to have believed that it contained a covenant for the payment of taxes on the land, and that its condition had been broken at the time they made the new agreement. Having an abstract of title of the premises, neither examined the mortgage or record thereof. Butson had paid the taxes which were in arrears, and to that extent his demand was valid. Whether the mortgage was then due or not the court will not inquire. The parties have settled that matter between themselves in so far as the new contract is concerned. That the policy of insurance should be made payable to the mortgagee as his interest might appear was the reasonable and usual method of underwriting a building with an encumbrance. Defendants were not deceived

nor overreached by plaintiff in any manner. The law favors a voluntary settlement of disputes to the end that the energies of the parties may be exercised in the affairs of life other than litigation.

There can be no question but that defendants, purchasing the real estate upon which plaintiff held a mortgage of \$2,500 and against which property there were unpaid delinquent taxes, gained an advantageous position by settling the matter, when a foreclosure of the mortgage was threatened, which was refrained from by the mortgagee. A contract based upon such a settlement did not lack a consideration. When the equities are otherwise all in favor of the enforcement of such a stipulation and it is necessary in order to preserve the security of plaintiff's mortgage that an equitable lien upon the insurance fund be declared, a court of equity should lend its aid in the enforcement of the covenant and declare the amount of the policy of insurance which has been collected by defendants to be held in trust for the plaintiff: 19 Cyc. 885; *Nordyke v. Gery*, 112 Ind. 535 (13 N. E. 683, 2 Am. St. Rep. 219).

3. Where a mortgagor is bound either by covenants in the mortgage or otherwise, for example, by a valid verbal agreement to keep the property insured as a further security for the payment of the mortgage debt, then the mortgagee is entitled to an equitable lien upon the money due on the insurance policy, even though the policy is made payable to the mortgagor; and the proceeds when collected by such mortgagor are held in trust for the benefit of the mortgagee: *Swearingen v. Hartford Ins. Co.*, 52 S. C. 309, 316 (29 S. E. 722); *Nichols v. Baxter*, 5 R. I. 491; *Wheeler v. Insurance Co.*, 101 U. S. 439, 442 (25 L. Ed. 1055); *Cromwell v. Brooklyn Fire Ins. Co.*, 44 N. Y. 42 (4 Am. Rep. 641);

Nordyke v. Gery, 112 Ind. 535 (13 N. E. 683, 2 Am. St. Rep. 219); *Chipman v. Carroll*, 53 Kan. 163 (35 Pac. 1109, 25 L. R. A. 305); *Hazard v. Draper*, 7 Allen (89 Mass.), 267.

4. Counsel for defendants urge that no amount of insurance was fixed by the agreement. It would be understood ordinarily by such a promise that the usual and proper amount of a policy upon the building was intended by the parties. They may not have known at the time the proper figures.

5. However, there is no difficulty upon that score as the amount of the insurance policy was fixed and determined when the same was written. A clause making the same payable to the mortgagee as his interest might appear should have been inserted in the instrument in accordance with the stipulation between plaintiff and defendants. Equity will treat the document as having been so framed. This is upon the principle that equity treats that as done which should have been done: *Nordyke v. Gery*, 112 Ind. 535 (13 N. E. 683, 2 Am. St. Rep. 219).

6. Defendants' counsel challenges the jurisdiction of a court of equity in the premises upon the ground that plaintiff's remedy was at law. He was entitled to have this specific fund held intact for him. The trial court required the defendants to pay the money into court to await the final determination of the cause. An action at law would not afford plaintiff an adequate remedy. In order to fully protect his rights, equity has jurisdiction and is an appropriate proceeding: *So. Portland Land Co. v. Munger*, 36 Or. 457 (54 Pac. 815, 60 Pac. 5); *Benson v. Keller*, 37 Or. 120, 127 (60 Pac. 918); *Livesley v. Johnston*, 45 Or. 30 (76 Pac. 13, 946, 106 Am. St. Rep. 647, 65 L. R. A. 783);

Hall v. Dunn, 52 Or. 475, 479 (97 Pac. 811, 25 L. R. A. (N. S.) 193).

The decree of the lower court was right, and should be affirmed, and it is so ordered. **AFFIRMED.**

MR. CHIEF JUSTICE MOORE, MR. JUSTICE BENSON and MR. JUSTICE HARRIS concur.

Submitted on brief September 20, affirmed October 24, 1916.

STATE v. EDLUND.*

(160 Pac. 534.)

Criminal Law—Offenses—"Accomplice"—Who Is.

1. Section 2370, L. O. L., declares that all persons concerned in the commission of a crime, whether they directly commit the crime or aid and abet in its commission, are principals, while Section 1540 declares that a conviction cannot be had upon the testimony of an accomplice unless corroborated, and that evidence merely showing the commission of the crime or the circumstances thereof is not sufficient. Prohibition Act (Laws 1915, pp. 151, 155), Sections 5 and 9, denounce the sale or barter of intoxicating liquors, while Section 7 declares that it shall be unlawful for any person to solicit, take or receive any order for intoxicating liquors, or to make any contract for the sale of any intoxicating liquors except where the sale is permitted. There was no provision for the punishment of persons purchasing intoxicating liquors. *Held*, that neither a purchaser nor his agent in effecting a purchase of intoxicating liquors is an accomplice of the seller, and a conviction may be had on the uncorroborated testimony of either; an "accomplice" being a responsible person whose willful participation in the commission of a crime renders him liable to conviction, though of course the agent of the seller would be an accomplice.

[As to who is an accomplice, see note in 138 Am. St. Rep. 273.]

Criminal Law—Trial—Jury Question.

2. When the evidence is conflicting as to whether a witness is an accomplice, the question should be submitted to the jury.

Criminal Law—Appeal—Harmless Error.

3. In a prosecution for the sale of intoxicating liquors, where the court improperly charged that the buyer's agent was an accomplice, the seller cannot complain that the instruction did not declare the buyer to be an accomplice, and require corroboration of the agent other than by the buyer to justify a conviction, for the instruction as given was more favorable than the seller was entitled to; the agent not being an accomplice.

*For cases passing on the question as to whether purchaser of intoxicating liquors illegally sold is an accomplice, see note in 41 L. R. A. (N. S.) 410. **REPORTER.**

From Coos: JAMES W. HAMILTON, Judge.

The defendant, Otto Edlund, was convicted of illegally selling intoxicating liquor, and he appeals.

Submitted on brief under the proviso of Supreme Court Rule 18: 56 Or. 622 (117 Pac. xi).

AFFIRMED.

For appellant there was a brief over the name of *Messrs. Stoll & Hodge*.

For the State there was a brief submitted over the names of *Mr. George M. Brown*, Attorney General, and *Mr. Lawrence A. Liljeqvist*, District Attorney.

In Banc. Opinion by MR. CHIEF JUSTICE MOORE.

The defendant, Otto Edlund, was convicted of the crime of unlawfully selling intoxicating liquor in Coos County, Oregon, and appeals from the resulting judgment, assigning as errors the action of the court in refusing to direct a verdict of not guilty, in denying requested instructions and in giving instructions. The testimony introduced by the state tends to show that on February 14, 1916, at Marshfield, Oregon, Mode T. Burwell informed E. Edson he desired to purchase some whiskey, whereupon the latter replied it could be secured from the defendant, to whom Edson introduced Burwell who told the defendant he wanted to buy a quart of whiskey "in bond." Edlund replied that he did not then have any of that kind. Thereupon the three men walked along the street until they came to a building in which was an office occupied by a physician whom Burwell wished to consult with reference to an injured hand. When the men reached the entrance leading to such office Burwell gave Edson

some money with which to purchase the desired liquor. Edson then accompanied the defendant to a room which he occupied in that city, where for a consideration of \$1.50 he delivered to Edson a bottle of whiskey. In the meantime Burwell, having seen the physician and obtained a prescription, had it filled at a drug-store and, returning to the street, he met the defendant and Edson, when the latter, in the presence of the defendant, delivered the bottle to Burwell. The defendant then departed and Burwell and Edson went behind a building on a dock and drank from the bottle, the contents of which was intoxicating. The errors assigned may be reduced to a single inquiry, viz.: Did the transaction on the part of Burwell and Edson make them accomplices in the alleged commission of the offense so as to render the testimony of either insufficient unless corroborated as required by our statute?

1. The defendant denies the sale of the liquor, but admits meeting Burwell and being introduced to him as stated. It will thus be seen that the proof of the actual delivery of the alcoholic beverage by the defendant to Edson depends upon the latter's testimony. Our statute declares:

"All persons concerned in the commission of a crime, whether it be felony or misdemeanor, and whether they directly commit the act constituting the crime, or aid and abet in its commission, though not present, are principals, and to be tried and punished as such": Section 2370, L. O. L.

Another enactment reads:

"A conviction cannot be had upon the testimony of an accomplice, unless he be corroborated by such other evidence as tends to connect the defendant with the commission of the crime, and the corroboration is not sufficient if it merely show the commission of the

crime, or the circumstances of the commission": Section 1540, L. O. L.

"An accomplice," says a text-writer, "is a person who knowingly, voluntarily and with common intent, with the principal offender, unites in the commission of the crime": Wharton, *Crim. Ev.* (10 ed.), § 440. This definition is approved in *State v. Roberts*, 15 Or. 187, 197 (13 Pac. 896), and cited as an authority in *State v. Carr*, 28 Or. 389, 396 (42 Pac. 215). In 1 R. C. L. 156, it is said:

"Notwithstanding the frequency of its use, there would seem to be no universally accepted definition of the term 'accomplice,' and its meaning in the law of evidence cannot be said to be settled."

The term, so far as involved herein, may be defined as follows: An accomplice is a responsible person whose willful participation in the commission of a crime, when that fact is established by competent evidence in a court of requisite jurisdiction, renders him liable to a conviction of the offense. As tending to show that Edson was a *particeps criminis* in the transaction, the defendant's counsel call attention to Section 7 of the Prohibition Act (Or. Gen. Laws 1915, Chap. 141), which is as follows:

"It shall be unlawful for any person to solicit, take or receive within this state any order for intoxicating liquor or make any contract for the sale of any intoxicating liquor, except in cases where the sale of such liquor within the state is permitted."

Reliance is also placed upon the decision rendered in the case of *State v. Gear*, 72 Or. 501 (143 Pac. 890), where an intermediary, with money furnished by a minor, having purchased from a licensed saloon-keeper intoxicating liquor, delivered it to the minor, and it was ruled that such intervening agent was

guilty of violating Section 2142, L. O. L., which declared it to be unlawful to "sell, give, or cause to be sold or given, any intoxicating liquor to any minor in this state." When that decision was given it was lawful for a person, having a license to sell in a particular place intoxicating liquor, to vend it therein to competent adults. In that case the opinion states in effect that the saloon-keeper did not understand nor had he any reason to know that the intoxicating liquor delivered to the intermediary was intended for a minor. The dealer must therefore have supposed the sale was made to the person applying for the beverage. Such person should have known whether or not the applicant to purchase intoxicating liquor was of legal age and if any error in judgment was committed in this particular by the intermediary, he should have been and was properly adjudged guilty of giving alcoholic beverage to a disqualified person: *State v. Gulley*, 41 Or. 318 (70 Pac. 385); *State v. Brown*, 73 Or. 325 (144 Pac. 444). In *State v. Gear*, 72 Or. 501 (143 Pac. 890), Mr. Justice BURNETT, in speaking for the court, remarked:

"If the purveyor of liquor to boys can escape on the subterfuge that he was their agent, drunkenness of minors had as well be canonized and the statute repealed."

The decision in that case has no bearing upon the questions here involved.

The Prohibition Act, which contains Section 7 hereinbefore quoted, repeals all other enactments on that subject in conflict therewith: Or. Gen. Laws 1915, Chap. 141, § 41. It prescribes, however, no provision for the punishment of a person found guilty of purchasing any intoxicating liquor from another in Oregon. The statute referred to is directed against the

person who unlawfully manufactures, sells or barter intoxicating liquors within this state (Id., § 5), or who illegally gives away or furnishes intoxicating liquor for the purpose of evading the provisions of that enactment (Id., § 9). No sales of alcoholic beverage can be made without obtaining a purchaser, it is true, but such buyer not having been interdicted from purchasing intoxicating liquors within Oregon, nor any punishment provided if he do so, he is not "concerned in the commission of a crime" within the meaning of that phrase as used in Section 2370, L. O. L., except perhaps, as all good citizens should be, in the enforcement of the provision of the Prohibition Act, and hence the conviction of a person for unlawfully selling intoxicating liquor may rest upon the uncorroborated testimony of the purchaser. Any other conclusion would render it almost impossible to secure the conviction of a person charged with illegally vending intoxicating liquors, unless such sale were made in the presence of disinterested witnesses who could testify in relation to the fact. If in consummating the sale of the intoxicating liquor Edson acted as the defendant's agent he, as vendor, was an accessory whose testimony, in respect to the commission of the offense, required corroboration. If, however, in securing the alcoholic beverage, Edson acted as Burwell's agent, he, as a purchaser, was not an accomplice, and hence his testimony alone was sufficient to authorize a conviction of the defendant.

2. When the evidence is conflicting, as to whether or not a witness is an accomplice, the question should be submitted, under proper instructions, to the jury: Underhill, Crim. Ev., § 69.

3. The trial court, after referring to the issues, said to the jury:

“I instruct you that the witness Edson would be under the evidence a party to the crime, if you find there was any crime committed; and therefore you can neither find there was a crime committed or that the defendant committed one, upon his uncorroborated testimony. There must be evidence independent of his testimony which tends to prove the commission of the offense, and to connect the defendant with it.”

An exception to this part of the charge was taken by defendant's counsel, on the ground the court should have said the corroboration to be sufficient must be by some witness other than an alleged purchaser of the intoxicating liquor.

An examination of the testimony conclusively shows there is no controversy in respect to the fact that Edson in purchasing the liquor was acting solely as Burwell's agent. The error of the instruction quoted seems to be based on a wrong conception of the Prohibition Act, wherein it appears to be taken for granted that Section 7 of that enactment rendered a purchaser of intoxicating liquor in Oregon amenable to that provision. Such is not the law. The instruction, however, was more favorable to the defendant than he could legally have asked, and for that reason he cannot complain of the language employed. The Prohibition Act has exempted the buyer of intoxicating liquors from the provisions of that statute, and, this being so, no error was committed as alleged.

The judgment is therefore affirmed. **AFFIRMED.**

Submitted on brief October 5, affirmed October 24, 1916.

STATE v. APLIN.

(160 Pac. 538.)

Intoxicating Liquors—Illegal Sale—Statute.

1. There are three necessary elements to the crime of selling intoxicants without a license in violation of Section 4938, L. O. L., as amended by Laws of 1913, page 505: First, defendant must have sold intoxicating liquor; second, must have sold it outside the limits of any incorporated city or town; and, third, must have sold without a license.

[As to construction of statutes against sale of intoxicating liquors, see note in 38 Am. Rep. 345.]

Intoxicating Liquors—Illegal Sale—Indictment—Sufficiency—Statute.

2. An indictment, charging that defendant, on a specified date in a specified county "then and there being, did then and there unlawfully sell two quarts of malt liquors, to wit, beer to [another] without first obtaining a license therefor as provided by law," was insufficient to charge the offense denounced by Section 4938, L. O. L., as amended by Laws of 1913, page 505, relative to the sale of intoxicants, as failing to allege the necessary element of the crime that the sale was outside the limits of an incorporated town.

From Marion: **PERCY R. KELLY**, Judge.

In Banc. Statement by **MR. JUSTICE McBRIDE**.

The defendant, Alfred Aplin, was indicted for the crime of selling intoxicating liquor without a license. The charging part of the indictment is as follows:

"The said Alfred Aplin, on the fifteenth day of July, A. D. 1915, in the county of Marion and State of Oregon, then and there being, did then and there unlawfully sell two quarts of malt liquor, to wit, beer, to W. B. Gill without first obtaining a license therefor, as provided by law."

The defendant demurred on the grounds: (1) That the indictment did not state facts sufficient to constitute a crime; (2) that the indictment did not substantially comply with the requirements of Chapter VII, Title XVIII, L. O. L., in that it failed to state the par-

ticular circumstances of the crime charged. The demurrer was sustained, and the state appeals.

Submitted on brief under the proviso of Supreme Court Rule 18: 56 Or. 622 (117 Pac. xi).

AFFIRMED.

For the State there was a brief submitted over the names of *Mr. Ernest R. Ringo*, District Attorney, and *Mr. Elmo S. White*, Deputy District Attorney.

For respondent there was a brief submitted by *Mr. Floyd A. Boyington*.

MR. JUSTICE MCBRIDE delivered the opinion of the court.

1, 2. At the date of the alleged offense there was in force in this state an act (Laws 1913, Chap. 265, p. 505) which provided among other things:

“No person shall be permitted to sell, give, or in any manner dispose of any spirituous, malt, vinous liquors, near beer, or fermented cider, commonly known as hard cider, in this state, outside of the limits or boundaries of any incorporated city or town.”

It was, however, provided that in any place outside of any incorporated city or town where the sale of intoxicating liquors was not prohibited by law, the County Court might, in its discretion, upon the petition of a majority of the voters of such precinct, grant a license to any *bona fide* club of not less than 50 members to dispense such liquors, and, further, that it might, upon a like petition, grant to any hotel outside of the limits of any incorporated town, and having accommodations for not less than 50 guests, a like license. For selling such liquors without a license there was prescribed a fine of from \$250 to \$500, or

imprisonment for not less than 60 days or more than 6 months, or both such fine and imprisonment. There are three necessary ingredients to this crime: (1) The defendant must have sold intoxicating liquor; (2) he must have sold it outside the limits of any incorporated city or town; (3) he must have sold it without a license. The passage of the prohibition amendment did not have the effect to extend this statute to cities and towns not theretofore embraced in its terms, and it is clear that the offense is not stated in the indictment sufficiently to bring it within any provision of the local option law, since it is not alleged that the sale was in dry territory. It is necessarily an attempt to charge the offense under Section 4938, L. O. L., as amended in 1913, *supra*. It is generally sufficient to charge a statutory offense in the language of the statute, but this was not done here. Everything charged in this indictment might be true, and yet the defendant not be guilty of the offense attempted to be charged. It is urged by the state that it was not necessary to charge that the offense was committed outside of any incorporated town or city, and *State v. Tamler & Polly*, 19 Or. 528 (25 Pac. 72, 9 L. R. A. 853), is cited in support of the contention. The case is not in point. In that case the defendants were indicted for violation of the provisions of an act prohibiting the sale of intoxicating liquors (Laws 1889, p. 9), the first section of which provided that it should be unlawful for any person to sell intoxicating liquors without having first obtained a license from the County Court of the proper county for that purpose. Subsequent sections prescribed a method by which such license should be obtained and a penalty for selling without a license. A further section contained this provision:

“Nothing in this act shall be so construed as to apply in any manner to incorporated towns and cities of this state.”

The court held that it was not necessary for the indictment to negative this proviso, Justice BEAN saying:

“The general rule on this subject is that where the exception or proviso is stated in the enacting clause, it is necessary to negative them in order that the description of the offense may in all respects, correspond with the statute; but where such exception or proviso is contained in another or subsequent section of the statute, it is a matter of defense and need not be negated in the indictment. 1 Bishop, Crim. Proc., §§ 631, 633; *Mills v. Kennedy*, 1 Bail. (S. C.) 17. While this seems to be the general rule, there is much diversity of judicial utterances as to the proper application, and to attempt to reconcile the authorities would be a useless, if not hopeless, task. When the exceptions or provisos are a material part of the description of the offense, it is necessary to negative them in the indictment. The indictment must contain such averments as show affirmatively an offense; and, where the exceptions or provisos are a material part of the description of the offense, the indictment must aver that the act charged does not come within the exception or proviso. The exceptions should be negated only when they are descriptive of the offense, or a necessary ingredient of its definition; but when they afford matter of excuse merely, they are matters of defense, and therefore need not be negated in the indictment. The offense defined in the act of 1889 is that of selling spirituous, vinous or malt liquors in certain prescribed quantities, without first having obtained a license in the manner prescribed by law. The provision of Section 11 is no part whatever of the description of the offense, nor a necessary ingredient of its definition, but is simply a limitation in the application of the provisions of the act. The description of the offense of selling liquor without a license is full and complete without reference to the provisions of

this section, and since it forms no part of the definition thereof, it is mere matter of excuse or defense, and need not be negatived in the indictment.”

Here the fact that the sale is outside the limits of an incorporated town is a necessary ingredient of the offense, and is included in the section defining it, and upon reasoning of that case the indictment is insufficient.

The judgment of the Circuit Court is affirmed.

AFFIRMED.

Submitted on brief October 5, affirmed October 24, 1916.

STATE v. APLIN.

(Four Cases.)

(160 Pac. 539.)

From Marion: PERCY R. KELLY, Judge.

In Banc. Statement PER CURIAM.

Four indictments were found against Alfred Aplin for selling intoxicating liquor without a license, and from judgments sustaining demurrers thereto, the state appeals.

AFFIRMED.

For the State there was a brief submitted over the names of *Mr. Ernest R. Ringo*, District Attorney, and *Mr. Elmo S. White*, Deputy District Attorney.

For respondent there was a brief prepared and filed by *Mr. Floyd A. Boyington*.

Opinion PER CURIAM.

These cases are, in all respects, similar to the case of the same title, *ante*, p. 621 (160 Pac. 538), in which

the opinion was this day handed down; and, upon the authority of that case, the judgment of the Circuit Court will be affirmed in each of them. **AFFIRMED.**

Submitted on brief October 7, affirmed October 27, 1916.

COOS BAY TIMES PUB. CO. v. COOS COUNTY.

(160 Pac. 532.)

Counties—Actions—Remedy by Certiorari.

1. An ordinary action at law may be brought to recover the amount claimed under a contract with the county which had been rejected in part by the County Court, where there are questions of fact as well as of law involved, since on a writ of review the court cannot examine a disputed question of fact, but can consider only facts disclosed by the record.

Counties—Officers—Authority—Publication of Tax Lists.

2. General Laws of 1913, page 576, requires the tax collector to publish in the newspapers selected by the County Court to publish court proceedings under Section 2902, L. O. L., a notice of delinquent taxes, which publication shall be for a price not exceeding the price prescribed by Section 2903, L. O. L. The latter section provides that compensation for the publication of lists and proceedings shall be fixed by the County Court not exceeding the limit therein specified. Section 937, L. O. L., gives the County Court the general care and management of the county property. *Held*, that the tax collector has no authority to contract for the publication of delinquent tax lists at a rate exceeding that fixed by the County Court.

Counties—Officers—Authority—Publication of Tax Lists.

3. The provision of General Laws of 1913, page 576, that in counties of more than 100,000 inhabitants the County Court shall cause the delinquent tax lists to be published at a compensation therein definitely fixed, does not indicate an intention of the legislature to confer on the tax collectors of other counties the authority to fix the compensation for such publication.

Newspapers—Contracts—Publication of Tax Lists.

4. The selection of official newspapers and establishing of the compensation for notices published therein by the County Court, and the acceptance of such appointment by a newspaper by doing the work with knowledge of the rate designated, constitutes a contract for the printing of the list at the rate specified, which neither party can thereafter ignore.

Work and Labor—Express Contract—Effect.

5. A newspaper which publishes a delinquent tax list under a contract fixing the amount of compensation pursuant to statute cannot recover a larger compensation on *quantum meruit*.

From Coos: GEORGE F. SKIPWORTH, Judge.

In Banc. Statement by MR. JUSTICE BEAN.

The Coos Bay Times Publishing Company, a corporation, brings this action against Coos County to recover compensation for printing the delinquent tax list for said county. From a judgment rendered on a verdict in favor of defendant, plaintiff appeals.

Submitted on brief under the proviso of Supreme Court Rule 18; 56 Or. 622 (117 Pac. xi). **AFFIRMED.**

For appellant there was a brief submitted over the name of *Messrs. Peck & Peck*.

For respondent there was a brief submitted over the name of *Mr. Lawrence A. Liljeqvist*, District Attorney.

MR. JUSTICE BEAN delivered the opinion of the court.

As developed by the record the case is as follows: On February 15, 1915, in accordance with the mandate of Section 2902, L. O. L., the County Court of Coos County selected the "Coos Bay Times," published by plaintiff, as one of the official newspapers of the county. On the same date, as shown by plaintiff's Exhibit D, the County Court entered a separate order fixing the price to be paid by the county for the publication of delinquent tax notices at three cents per line for each insertion. On and between April 5 and May 3, 1915, at the instance of the county, plaintiff published the delinquent tax list and notice of delinquency in five issues of its paper. This was done upon a copy being furnished by the sheriff. The plaintiff claims that a contract was made with the tax collector to the effect that the defendant would pay five cents per line for

each publication thereof. Plaintiff duly presented its claim for such services to the County Court, aggregating, at the five cent rate, \$1,035. The County Court allowed \$592.35, the price fixed by it, rejected \$440.65 of the amount claimed, and issued a warrant for the sum allowed, which was not accepted by the publishing company, and this action was instituted. Plaintiff alleges a contract for the printing at the rate of five cents per line for each issue of the newspaper. Defendant denies the contract as alleged, and insists that under the statute the County Court is the proper tribunal to fix such compensation. Plaintiff also claims that the amount charged by it was the reasonable value of the services. The trial court rejected this latter claim and all evidence in support thereof and also all evidence tending to prove a contract fixing the rate made by the tax collector on behalf of the defendant county.

1. It is contended by counsel for defendant that the questions involved herein cannot be settled in an ordinary action at law, and that plaintiff's remedy, if any, is by a writ of review. We see no merit in this contention. There is presented in this case an important question of law. There was also a controverted question of fact as to what was the contract between the parties. Plaintiff also sought to establish the reasonable value of the services performed. Both questions of law and fact can appropriately be tried in this action at law without resorting to a writ of review: *Metschan v. Grant County*, 36 Or. 117, 120 (58 Pac. 80); *Wallowa County v. Oakes*, 46 Or. 33, 35 (78 Pac. 892); *Mackenzie v. Douglas County*, ante, p. 442 (159 Pac. 625). Upon a writ of review the court will not examine a disputed question of fact: *Oregon Coal Co. v. Coos County*, 30 Or. 308 (47 Pac. 851);

Curran v. State, 53 Or. 154 (99 Pac. 420). In such a proceeding the court will consider only such facts as are disclosed by the record presented by the return: *Raper v. Dunn*, 53 Or. 203, 205 (99 Pac. 889). In such case evidence outside of the record will not be considered: *Gue v. City of Eugene*, 53 Or. 282, 288 (100 Pac. 254); *Gay v. City of Eugene*, 53 Or. 289, 294 (100 Pac. 306, 18 Ann. Cas. 188). "When the facts are all admitted," says Mr. Justice STRAHAN in *Vincent v. Umatilla Co.*, 14 Or. 375 (12 Pac. 732), "the sole question at issue is one of law, and the writ may furnish a cheap and expeditious remedy.

2. The question herein presented for consideration involves the construction of Chapter 301, General Laws of Oregon, 1913 (see page 576), as to who is authorized to enter into a contract on behalf of a county for the printing of the delinquent tax list. That statute, in so far as necessary to here note, requires that four months after the date when taxes charged against real property are delinquent, the tax collector shall cause to be published once each week for four successive weeks in the newspaper or newspapers selected by the County Court to publish court proceedings under the provisions of Section 2902, L. O. L., a notice of delinquent taxes on real property and statement that six months after such taxes are delinquent a tax certificate of delinquency will issue. Such notice shall be published for a price not exceeding the price prescribed by Section 2903, L. O. L. The act further provides that in counties of 100,000 or more inhabitants the County Court shall cause such delinquent tax to be published in daily newspapers having a specified circulation, and definitely fixes the compensation for such publication in the latter class of counties which does not include the defendant

take nothing
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ant.

No error
affirmed.

MR. CHIEF
MR. JUSTICE

MR. JUSTICE

Motion

Criminal Law

1. Under Section 100, perfected by Section 101, that on appeal filed must, with may allow, trial if any, and that an appeal will the time present the negligence

Criminal Law

2. Where a filing the not right of appeal stipulate for

From M

In Banc.

The defendant
Circuit Court
arson, and

county. Coos County is in the class containing over 10,000 population.

We turn now to Sections 2902 and 2903, L. O. L., to which for brevity's sake reference is made in the act of 1913. The two laws, so far as they relate to the same subject, must be construed *in pari materia*. Section 2902 requires the County Court of counties of the class embracing the defendant to select two newspapers having the largest circulation within the county, in which the proceedings of the court as entered of record shall be published at the expense of the county. Section 2903 is as follows:

“Compensation for the publication of such list of claims and proceedings shall be fixed by the County Court: Provided, that for each square of ten lines of brevier type (newspaper measure), or its equivalent, the cost shall in no case exceed fifty cents per square as aforesaid.”

It will be seen, therefore, that the price for printing the delinquent tax list as provided by Chapter 301 is that to be fixed by the County Court not exceeding the figure named. The County Court having in the manner prescribed by Section 2904 obtained the information as to the number of *bona fide* subscribers of the plaintiff's newspaper and one other, selected the two publications as the county official newspapers. On the day of the appointment of the official organs which was the proper time as announced in *Flagg v. Columbia County*, 51 Or. 172 (94 Pac. 184), pursuant to the authority given, that tribunal fixed the amount to be paid by the county for such services. Sections 2902 and 2903, L. O. L., are as much a part of the act of 1913, in so far as the provisions are cognate to the subject matter thereof, as though the provisions relating to the fixing of the price were incorporated in

that statute. Again, as emphasizing the legislative intent, Section 937, L. O. L., declares:

“The County Court has the authority and powers pertaining to county commissioners to transact county business; that is— * * 9. To have the general care and management of the county property, funds, and business, where the law does not otherwise expressly provide.”

See *State v. Holman*, 68 Or. 546 (137 Pac. 771).

3, 4. The tax collector is a ministerial officer, and is not empowered by our statute in this instance to make a contract binding upon the county for the performance of the work in question. The provision relating to counties of over 100,000 inhabitants does not indicate to us that the legislature intended to confer such authority upon that official as contended by counsel for plaintiff. The plaintiff was aware of the rate designated by the County Court and before the printing was done applied to that tribunal to change the order made from three to five cents a line, which request was denied. The selection of the newspaper and establishing the compensation for the notice to be published therein by the County Court and the acceptance of such appointment by plaintiff by doing the work constituted a contract for the printing of the delinquent tax list which neither the county nor plaintiff had a right to ignore after the services were performed: *Flagg v. Columbia County*, 51 Or. 172 (94 Pac. 184); 29 Cyc. 700 (e).

5. Under the facts in this case as delineated by the evidence the matter of the averment of a reasonable value of the printing becomes unimportant, and the plaintiff was not prejudiced by any ruling of the trial court in regard thereto; that is, the plaintiff could not recover upon a *quantum meruit* when the amount of

compensation was fixed by contract pursuant to the statute. The plaintiff failed to establish a valid contract as alleged in its complaint, and is only entitled to the amount for which the county warrant was drawn. The trial court apparently by a slightly different process arrived at the same conclusion as indicated herein.

Finding no prejudicial error in the record the judgment of the lower court is affirmed. **AFFIRMED.**

Argued October 9, affirmed October 27, 1916.

IN RE MARKS' ESTATE.

(160 Pac. 540.)

Executors and Administrators—Sale of Realty—Jurisdiction of County Court.

1. By the publication of a citation to some of the parties interested in an estate and personal service as to the others, the County Court acquired jurisdiction to make a decision on the matter of an administrator's application for an order to sell realty.

Executors and Administrators—Sale of Realty—Order—Review.

2. In the absence of any direct provision for setting aside an order for an administrator's sale of realty, Section 103, L. O. L., providing that the court may allow an answer or reply to be made after the time limited by the Code, and may within one year after notice thereof relieve a party from an order taken against him through his mistake, inadvertence, etc., orders made in the exercise of the court's discretion are not reviewable except for abuse of discretion, and a refusal to vacate an order for an administrator's sale of realty on the ground that it was made without actual notice to part of the petitioners was not an abuse of such discretion.

Executors and Administrators — Sale of Realty — Order — Vacation — Answer.

3. Under Section 59, L. O. L., providing that defendants against whom publication has been ordered may, upon good cause shown, be allowed to defend within one year after judgment, parties seeking the vacation of an order for an administrator's sale of realty and for permission to make objections and defenses thereto would be denied relief for failure to tender an answer with the petition.

Executors and Administrators—County Court—Removal of Administrator—Discretion.

4. County Courts are vested with a very large discretionary power over the conduct of executors and administrators.

Executors and Administrators — Qualification — Surety of Former Administrator.

5. The surety of a former administrator is not necessarily disqualified from acting as administrator *de bonis non* because of a potential interest which may thereafter appear, but to justify his removal something more should appear, as the court cannot presume that he will squander the estate or fail to properly administer it.

Descent and Distribution—Executors and Administrators—Surcharging Administrator.

6. Parties interested in an estate may surcharge an administrator's final account if he fails to reduce its choses in action to possession, and, if he refuses to collect debts owing the estate and properly apply the proceeds, the heirs may themselves realize upon them in the interest of the estate.

Executors and Administrators—Administrator's Indebtedness—Liability of Sureties.

7. If an administrator owes an estate, his debt will be reckoned as so much money on hand for which his sureties will be liable.

From Douglas: LAWRENCE T. HARRIS, Judge.

Department 2. Statement by MR. JUSTICE BURNETT.

This litigation originated in the County Court of Douglas County. The matter before us has a double aspect. It appears from the petition to that tribunal that E. L. Parrott was appointed administrator *de bonis non* of the estate of S. Marks, deceased, and of the partnership estate of S. Marks & Co., of which said decedent was one of the partners. H. Wollenberg had previously been administrator *de bonis non* of those estates succeeding a deceased administrator, and Parrott had underwritten his bonds with others. The petition recites the relationship of the petitioners to S. Marks, the history of the partnership, the removal of Wollenberg, and the appointment and qualification of Parrott. It also recounts the appointment of one Asher Marks as the first administrator of those estates and his death, leaving the estates unadministered. It avers various shortcomings of Wollenberg. All it says about Parrott, besides the fact that he was one of the sureties of Wollenberg on his official bond, is this:

“That said Herman Marks, as executor, and the sureties on the official bond of Asher Marks, as administrator of the estates of S. Marks, deceased, and said H. Wollenberg as administrator *de bonis non* of the estate of S. Marks, deceased, and S. Marks & Co., and as administrators of the copartnership of S. Marks & H. Wollenberg, and the sureties on his official bonds, must account to the administrator *de bonis non* of said estates in the premises, and the County Court of the State of Oregon has original and exclusive jurisdiction of the same; and E. L. Parrott, present administrator *de bonis non* of said estates, is disqualified to act in the premises by reason of his being a surety on each of said official bonds of H. Wollenberg; that accountings and settlements of both said copartnerships and said former administration of Asher Marks and H. Wollenberg are necessary to be had before any final account and settlement of said estates can be ordered, and they cannot be proceeded with until the present administrator, E. L. Parrott, is removed, and a qualified administrator *de bonis non* appointed in his place.”

The County Court dismissed the petition to remove Parrott, and this action was affirmed on appeal to the Circuit Court. Heard with this, by agreement of counsel, was the matter of a petition filed by the same petitioners on April 26, 1911, in the County Court to vacate an order of sale of real property secured by Parrott as administrator on February 1, 1911. Jurisdiction for the making of such order was acquired partly by publication and partly by personal service of citation. The petition to vacate the order makes no question about the regularity of service, but alleges that the order was made without actual notice to three of the petitioners. They declare that, if they had received such notice or information of the proceedings, they could and would have defended against the application on certain grounds which they allege. The

County Court denied this petition and refused to vacate the order of sale. An appeal was taken by these petitioners to the Circuit Court which there affirmed the decision of the County Court. In both these matters the original petitioners have appealed to this court.

AFFIRMED.

For appellants there was a brief with oral arguments by *Mr. Commodore S. Jackson* and *Mr. Edward B. Watson*.

For respondent there was a brief and an oral argument by *Mr. George M. Brown*.

MR. JUSTICE BURNETT delivered the opinion of the court.

1, 2. All that appears in the abstract in the way of pleadings are the petitions for the removal of Parrott and for the vacation of the order of sale. As to the latter, it is sufficient to say that by the publication of a citation to part of the petitioners and personal service as to the others the County Court acquired jurisdiction to make a decision in the matter involved. It is not by the mark at the present juncture to say whether that decision was right or wrong in point of law. Having jurisdiction of the subject matter and of the parties, the court had a right to decide either correctly or erroneously. In the statute relating to the administration of estates there is no direct provision for setting aside an order of sale. The petitioners claim they were entitled to relief by virtue of the provisions of Section 103, L. O. L., reading thus:

“The court may likewise, in its discretion, and upon such terms as may be just, allow an answer or reply to be made, or other act to be done after the time limited by this Code, or by an order enlarge such time:

and may also, in its discretion, and upon such terms as may be just, at any time within one year after notice thereof, relieve a party from a judgment, order, or other proceeding taken against him through his mistake, inadvertence, surprise, or excusable neglect."

It will be observed that relief under this section is explicitly referred to the discretion of the court, and it has been constantly held that orders made in the exercise of this prerogative are not reviewable on appeal except for abuse of the power. The record before us does not disclose any such situation. Hence, so far as relates to Section 103, L. O. L., the matter of the vacation of the order may be dismissed without further attention; it not being an appealable order.

3. If the petitioners base their contention on Section 59, L. O. L., allowing them as a matter of right, as decided in *Felts v. Boyer*, 73 Or. 83 (144 Pac. 420), to answer within one year after default decree taken on publication of summons, they yet must fail because they did not tender their answer with their petition to vacate the order of sale. On the contrary, they pray for "an order vacating and setting aside said order of sale of February 1, 1911, and allowing them to make said and any other proper objections and defenses to said petition for the sale of real property as they may be advised and believe proper to do under Section 103 of B. & C. Code Laws of Oregon." The answer was avowedly *in futuro* and might or might not have been filed. In *Mayer v. Mayer*, 27 Or. 133 (39 Pac. 1002), and *Egan v. North American Loan Co.*, 45 Or. 131 (76 Pac. 774, 77 Pac. 392), this court has decided that the proper practice in such cases is to tender the proposed answer with the application to take off the default. The court will not set aside a decree and leave the way open for such experiments *ad libitum* as may suggest themselves to ingenious

counsel. It is only for "sufficient cause shown" that the belated defendant will be let in. An answer to the merits tendered with the application is an essential part of the procedure wanting in this instance.

4-7. As to the matter of removal of the administrator, it is said by Mr. Justice EAKIN in this self-same case, *In re S. Marks & Co's Estate*, 66 Or. 340, 346 (133 Pac. 777, 779), that:

"In the very nature of things, County Courts are vested with a very large discretionary power over the conduct of executors and administrators."

This was stated with reference to the removal of Wollenberg as administrator *de bonis non*. The allegation here against Parrott is a mere conclusion of law. No charge is made that he has proved unfaithful to his trust in any manner whatever, yet this is one of the grounds authorizing the removal of an administrator under Section 1159, L. O. L. We might imagine that in the future complications could possibly arise, where his personal interests would conflict with his official duty; but no such situation is yet presented. It does not follow as a matter of law that the surety of a former administrator is necessarily disqualified because of a potential interest which might afterward appear. The same objection might be urged against the appointment of a creditor of a decedent to administer the estate of the latter. Debtors of an estate are often appointed to its administration. Something more should appear in the petition than the bare fact that Parrott had been surety for a former administrator. We cannot presume that he will squander the estate or fail to properly administer it. The petitioners are not without remedy in the premises, for they may surcharge his final account if he squanders the estate or fails to reduce its choses in action to possession. If he owes the estate, his debt would be reckoned

as so much money on hand for which his sureties would be liable under *United Brethren v. Akin*, 45 Or. 247 (77 Pac. 748, 2 Ann. Cas. 353, note, 66 L. R. A. 654). If he refuses to collect debts owing to it and properly apply the proceeds, the heirs by suitable litigation may themselves realize upon them in the interest of the estate under the doctrine announced in *Hillman v. Young*, 64 Or. 73 (127 Pac. 793, 129 Pac. 124).

We are not unmindful of what has been said by this court in the cases of *In re Estate of Mills*, 22 Or. 210 (29 Pac. 443), *Marks v. Coats*, 37 Or. 609 (62 Pac. 488); *Bean v. Pettengill*, 57 Or. 22 (109 Pac. 865), and *Manser's Estate*, 60 Or. 240 (118 Pac. 1024). In all those instances there was a direct conflict between the estate and the administrator as to the title to certain property in which it was impossible for him to act indifferently. They each present a situation where the administrator claimed as his own certain property which had and as the petitioners averred yet belonged to the decedent, all of which was made to appear by appropriate pleading. In the present juncture the liability of Parrott is at best secondary and may never arise. When it does, it will be time enough to suspend his activities in the fiduciary capacity under consideration. It would invade the discretionary power of the County Court over administrators if upon the showing made we should sanction the removal of the present administrator, especially where the petitioners have so many means of protecting their interests in the estate.

The decree of the Circuit Court is affirmed.

AFFIRMED.

MR. CHIEF JUSTICE MOORE, MR. JUSTICE MCBRIDE and MR. JUSTICE BEAN concur.

MR. JUSTICE HARRIS took no part in the consideration of this case.

Argued October 9, affirmed October 27, 1916.

IN RE MARKS' ESTATE.

(160 Pac. 542.)

From Douglas: LAWRENCE T. HARRIS, Judge.

Department 2. Statement by MR. JUSTICE BURNETT.

This is a proceeding for the removal of E. L. Parrott, as administrator *de bonis non* of the estate of S. Marks & H. Wollenberg. From a judgment of the Circuit Court, affirming the County Court's denial of such petition, petitioner appeals. AFFIRMED.

For appellants there was a brief with oral arguments by *Mr. Commodore S. Jackson* and *Mr. Edward B. Watson*.

For respondent there was a brief and an oral argument by *Mr. George M. Brown*.

MR. JUSTICE BURNETT delivered the opinion of the court.

This is an appeal from the decision of the Circuit Court sustaining the action of the County Court of Douglas County in refusing to remove E. L. Parrott from the position of administrator *de bonis non* of the estate of the firm of S. Marks & H. Wollenberg. As to the removal of the administrator, it presents the same questions considered in the opinion this day rendered in the matter of the *Estate of S. Marks, Deceased*, and of the *Partnership Estate of S. Marks & Co., ante*, p. 632 (160 Pac. 540).

For the reasons there stated, the decision of the Circuit Court is affirmed. **AFFIRMED.**

MR. CHIEF JUSTICE MOORE, MR. JUSTICE McBRIDE and MR. JUSTICE BEAN concur.

MR. JUSTICE HARRIS took no part in the consideration of this case.

Motion to dismiss appeal filed September 9, appeal dismissed October 27, 1916.

KYLA-KIEROLA v. STANLEY-SMITH LUMBER CO.

(160 Pac. 542.)

Appeal and Error—Decisions Reviewable—Order Reinstating Cause.

1. An order reinstating an action dismissed without prejudice, because the statute of limitations would bar the institution of another action for the same cause, is not final, and an appeal therefrom will be dismissed.

From Hood River: WILLIAM L. BRADSHAW, Judge.

This is an action by Gustava Kyla-Kierola against the Stanley-Smith Lumber Company, a corporation. From an order reinstating the action after dismissal without prejudice, defendant appeals, and plaintiff's counsel moves to dismiss the appeal.

APPEAL DISMISSED.

Mr. Leroy Lomax, Mr. Kazis Krauczumas, Mr. James J. Crossley and Mr. Julius N. Hart, for the motion.

Messrs. Crawford & Eakin, contra.

Opinion by MR. CHIEF JUSTICE MOORE.

The reply in this cause was filed November 16, 1915, but prior thereto a commission was issued to take the

testimony of the plaintiff who resided in Finland. At the next term of court which convened March 6, 1916, the action was dismissed without prejudice and without notice to the plaintiff's counsel.

As the statute of limitations would bar the institution of another action for the same cause, the court during the same term, upon the motion of the plaintiff's counsel, reinstated the action, from which order the defendant appeals. The plaintiff's counsel moves to dismiss the appeal on the ground that the order undertaken to be reviewed is not final. Based upon the decision in the case of *First Christian Church of Medford v. Robb*, 69 Or. 283 (138 Pac. 856), the appeal should be dismissed, and it is so ordered.

APPEAL DISMISSED.

Submitted on brief October 25, reversed October 27, 1916.

MORGAN v. RUBLE.

(160 Pac. 543.)

**Corporations—Liability of Stockholders—Unpaid Subscriptions—
Defenses—Fraud.**

1. In a suit by a judgment creditor after execution returned *nulla bona*, to enforce the liability of the stockholders in an insolvent corporation upon their unpaid subscriptions to its capital stock, where the creditor did not know of alleged fraudulent representations to defendants to induce them to become stockholders, such fraudulent representations were no defense to the suit.

From Marion: WILLIAM GALLOWAY, Judge.

In Banc. Statement by MR. JUSTICE BENSON.

This is a suit by W. H. Morgan, a creditor, against John Ruble, Al. Walling, J. H. Brigham, S. B. Savage, John Walling, Tracy Walling, Harry F. Savage, C. J. Crandle, J. M. Spong, J. F. McKinley, W. F. Franklin and William Wilkins, to enforce the individual liability of stockholders in an insolvent corporation upon their

unpaid subscriptions to capital stock. The Lincoln Stove Company, having been duly incorporated with the defendants as stockholders, executed and delivered its promissory note to plaintiff, which was not paid at maturity, and plaintiff, in a proper proceeding, obtained a judgment against the corporation thereon in the sum of \$213.25, with interest at 6 per cent, \$65 as attorney fees, and costs at \$14.70. An execution having been issued and returned *nulla bona*, this suit was begun.

A second cause of suit is based upon an assigned claim of \$613.33, upon an account stated in favor of the H. S. Gile Grocery Company. The insolvency of the corporation is admitted. The execution and delivery of the promissory note, the judgment thereon, and the unsatisfied execution are admitted. The assignment of the claim of the H. S. Gile Grocery Company is admitted.

After some unimportant denials the defendants plead affirmatively that the organizers of the corporation made false and fraudulent representations to them, whereby they were induced to subscribe for the corporate stock. A trial being had, there was a decree dismissing plaintiff's suit, from which he appeals.

REVERSED.

For appellant there was a brief submitted over the name of *Mr. Willam H. Trindle*.

For respondents there was a brief submitted over the name of *Messrs. Smith & Shields*.

MR. JUSTICE BENSON delivered the opinion of the court.

1. There is but one question involved in this case, and that is as to whether or not the fact that the pro-

motors of a corporation made false and fraudulent representations to the defendants to induce them to become stockholders can be relied upon to defeat the claim of a creditor. It is true that the answer alleges that plaintiff knew of these facts and fraudulent representations, but we find no evidence in the record to support the allegation. It is perfectly clear from the evidence that if there was anything wrong in the procuring of defendants' stock subscriptions, the plaintiff was ignorant of the fact and had nothing to do with it.

In *Stewart v. Rutherford*, 74 Ga. 435, 440, the court says:

"Of course if innocent parties have been affected by the corporation during its operation, the court will protect them, and the complainant alleges that creditors thereof should be paid, if there be such. As he united with the defendants in creating this wildcat sort of adventure, all the way from West Virginia to Georgia, although deluded and decoyed into it, the equity of people who had no part or lot in making it and bringing it to Georgia is superior to his own."

The case of *Howard v. Glenn*, 85 Ga. 238, 261 (11 S. E. 610, 612, 21 Am. St. Rep. 156) is a case precisely like the one at bar, and in discussing a similar defense the court says:

"Whether Howard became a stockholder in this company by subscription which was induced by fraud practiced upon him, or not, if he did become a stockholder in said company, he is liable to the creditors of the company for so much of his unpaid stock as might be necessary to pay the company's debts, taken in connection with the other corporators of the company. And whether fraud was practiced upon him or not, would make no difference as to the creditors; it would be a question between him and the corporation, with which the creditors had nothing to do."

This is in line with the weight of authority, and is strictly equitable.

It follows that the decree must be reversed and one entered here in accordance with the prayer of the complaint, and it is so ordered.

REVERSED. DECREE RENDERED.

Argued October 8, affirmed October 24, rehearing denied November 14, 1916.

DOUGLAS CREDITORS' ASSN. v. HUTCHASON.

(160 Pac. 539.)

Exceptions, Bill of—Incorporating Evidence.

1. A bill of exceptions consisting of a *verbatim* report of the testimony for both parties given at the trial in the Circuit Court is not a proper bill.

Appeal and Error—Reservation of Grounds of Review—Exceptions to Rulings.

2. There can be no reversal where, throughout the testimony, no exception was taken to any ruling of the court, since only for error legally excepted to will a decision of the Circuit Court be reversed.

From Douglas: **GEORGE F. SKIPWORTH, Judge.**

Department 1. Statement by MR. JUSTICE BURNETT.

The Douglas Creditors' Association, a corporation, sued the defendant, J. F. Hutchason, in a Justice's Court on some assigned accounts against him. Defeated in that tribunal, the defendant appealed to the Circuit Court, where a like result befell him. On his appeal here the only assignment of error is "that at the conclusion of the plaintiff's testimony the defendant moved the court for a nonsuit, and the court overruled said motion."

AFFIRMED. REHEARING DENIED.

For appellant there was a brief and an oral argument by *Mr. Albert Abraham*.

For respondent there was a brief over the name of *Messrs. Buchanan & Porter*, with an oral argument by *Mr. Ora H. Porter*.

MR. JUSTICE BURNETT delivered the opinion of the court.

1. The so-called bill of exceptions before us is a *verbatim* report of the testimony for both parties given at the trial in the Circuit Court. It does not conform to the frame of such a document as specified in *National Council v. McGinn*, 70 Or. 457 (138 Pac. 493), and cognate cases.

2. Besides this it appears that throughout the narration of the testimony not an exception was taken to any ruling of the court. It has been held from the earliest judicial times in this state that only for error legally excepted to will a decision of the Circuit Court be reversed. This precludes further examination of the instant case.

The judgment is affirmed.

AFFIRMED. REHEARING DENIED.

MR. CHIEF JUSTICE MOORE, MR. JUSTICE McBRIDE and MR. JUSTICE BENSON concur.

Motion for order of maintenance filed May 3, overruled May 25, 1915.
Argued on the merits October 9, affirmed November 14, 1916.

IN RE NORTHCUTT.*

(148 Pac. 1133; 160 Pac. 801.)

Parent and Child—Support of Child—Enforcement—Statutory Proceedings.

1. Under Section 7054, L. O. L., requiring parents to maintain their children when poor and unable to work, and Section 2922, providing that every poor person, who shall be unable to earn a living, shall be supported by the father, mother, children, brothers or sisters of such person, if they or either of them be of sufficient ability, and every person who shall fail to support his or her father, mother, child, brother or sister when directed by the County Court shall forfeit \$30 a month to the poor fund of the county, and such other sums as the County Court shall deem sufficient, to be recovered in the name of the County Court, the procedure to compel the support of an incapacitated adult child by a parent, provided by the latter section, is exclusive, and the Supreme Court cannot, on appeal in proceedings to have the father of such child declared a mental incompetent, order the father to pay for the support of the child pending the determination of the appeal.

Insane Persons—Guardian—"Incapable" Person.

2. Persons "incapable of conducting their own affairs" for whom, in addition to insane persons and idiots, Section 1319, L. O. L., authorizes the appointment of a guardian, are persons unable without assistance properly to manage and take care of their property, and who would be likely to be deceived, dominated, or imposed on by artful or designing persons; it not being enough that one does not handle his property judiciously.

Insane Persons—Guardian—Incapable Person—Evidence.

3. Evidence in proceeding for appointment of a guardian for one 77 years old, about to marry and move to another state, with the idea of building a lighting plant, *held* not to show that he was incapable of conducting his own affairs, within Section 1319, L. O. L.

From Marion: WILLIAM GALLOWAY, Judge.

In Banc. Statement by MR. JUSTICE McBRIDE.

Eva Palmerton instituted proceedings in the County Court to have S. T. Northcutt, her father, declared incompetent to manage his own property, and to have a

*For authorities passing on the question of desire of aged person to marry, as ground for appointment of guardian, see note in 47 L. R. A. (N. S.) 475. REPORTER.

guardian appointed for that purpose. After a trial there he was found incompetent, and E. M. Croisan was appointed his guardian. The father appealed to the Circuit Court, where the order was reversed. Whereupon the daughter appealed to this court, in which the matter is pending. She now files a motion asking that this court make an order for her temporary support out of the funds of the respondent pending the final hearing here.

MOTION OVERRULED.

Messrs. Carson & Brown, for the motion.

Mr. Walter E. Keyes and Mr. Charles L. McNary,
contra.

MR. JUSTICE McBRIDE delivered the opinion of the court.

At common law there was originally no legal duty of a parent to support a helpless adult child, but this defect in the law was corrected by the passage of 43 Eliz., Chap. 2, § 7, which enacted:

“The father and grandfather, and the mother and grandmother, and the children of every poor, old, blind, lame, and impotent person, or other poor person not able to work, being of a sufficient ability, shall, at their own charges, relieve and maintain every such poor person in the manner, and according to that rate, as by the justices of the peace of that county where such sufficient persons dwell, or the greater number of them at their general quarter sessions, shall be assessed, upon pain that every one of them shall forfeit twenty shillings for every month which they shall fail therein”: 1 Chitty’s Blackstone, *448, and note.

Section 7054, L. O. L., which is among our very early statutes, having been passed in 1853, provides:

“Parents shall be bound to maintain their children when poor and unable to work to maintain themselves;

and children shall be bound to maintain their parents in the like circumstances.”

Section 2922, L. O. L., passed in 1854, provides:

“Every poor person who shall be unable to earn a livelihood in consequence of bodily infirmity, idiocy, lunacy, or other cause, shall be supported by the father, mother, children, brothers, or sisters of such poor person, if they or either of them be of sufficient ability; and every person who shall fail or refuse to support his or her father, mother, child, sister, or brother, when directed by the County Court of the county where such poor person shall be found, whether such relative reside in the county or not, shall forfeit and pay to the county, for the use of the poor of their county, the sum of \$30 per month, or such other sums as the court shall find sufficient, to be recovered in the name of the County Court for the use of the poor as aforesaid before any justice of the peace or any court having jurisdiction: Provided, that when any person becomes a pauper from intemperance or other bad conduct, he shall not be entitled to any support from any relation except parent and child.”

From these statutes it will be seen that a method of procedure is pointed out, which method is logically exclusive of any other. As stated by Mr. Chief Justice WOLVERTON, in *Faling v. Multnomah County*, 46 Or. 460 (80 Pac. 1009):

“The policy of the law is apparent. The County Court is vested with exclusive superintendence of the poor, and the duty of a relative to support a poor relative, within the degree of consanguinity designated, is enjoined. This much is explicit and clear. The County Court is accorded the further authority, by the strongest implication, to direct such relative possessing the ability to discharge that duty. This in furtherance of its superintendence of the poor. The court could not very well direct the relative to discharge the duty thus enjoined upon him without according him a hearing, and to such purpose it would not be improper

to cite the alleged delinquent to appear before it to show cause why the direction should not be made. Several things are to be inquired into by the court before it could regularly enter the order. It should determine the degree of consanguinity, the capability of the alleged pauper, whether he has become such from intemperance or other bad conduct, and the ability of the relative to discharge the duty. Upon these questions, and others, it might be, the relative is entitled to a hearing in regular course before he can be adjudged delinquent and derelict in duty and directed to render support. Further, however, than for the determination of these things, necessary for rendering the order against the delinquent relative, we think it was not intended that the County Court should have jurisdiction. The forfeiture spoken of is entailed by refusing to observe the direction of the County Court, which gives the county a right to recover in the name of the County Court against the relative refusing to obey the order, and a proper proceeding may be instituted for that purpose before a justice of the peace or any court having jurisdiction, and it is the province of this latter court to determine as to the forfeiture and the amount proper for recovery. In such a proceeding the County Court would not become its own arbiter, but its position would be the same as any other litigant, free to establish its cause. Thus the County Court would have the means of showing what the expense would be of maintaining the pauper, which would be the proper measure of the recovery against the relative, and thus it may substantiate its cause. The statute was probably intended, not for the punishment of the relative refusing to obey the direction of the County Court, but to give a remedy to the county by which to recover the amount necessary to the support of the pauper in its superintendence of the poor.”

Following the decision quoted, which we think is the only logical construction of our statutes, we conclude that we have no jurisdiction to make the order requested, and the motion is overruled.

MOTION OVERRULED.

Argued October 9, affirmed November 14, 1916.

ON THE MERITS.

(160 Pac. 801.)

Department 2. Statement by MR. JUSTICE HARRIS.

A petition was filed on December 16, 1914, by Mrs. Eva Palmerton for the appointment of a guardian to manage the estate of her father S. T. Northcutt, who owns notes and mortgages amounting to about \$26,000. The petitioner is his daughter and only child. The daughter filed a petition asking for the appointment of a suitable person as guardian of the estate of the father, and alleging that by reason of his age and mental and physical infirmities he had been defrauded of considerable property and was incapable of conducting his own business. He answered by saying that he was able to look after his own affairs, and charged that the daughter "is afraid that some portion of his estate will be spent on some person other than herself," and that she filed a petition for a guardian because he had planned to leave the state on account of his health, and because he intended to marry a designated woman who lives in Marion County. The petitioner replied by averring that her only purpose is to protect her father from the machinations and schemes of dishonest and designing persons. After hearing the evidence the County Court decided that S. T. Northcutt was not capable of conducting his own affairs and appointed a guardian of his estate. The appointment was set aside upon an appeal to the Circuit Court, and the petitioner is prosecuting the appeal to this court. **AFFIRMED.**

For appellant there was a brief over the name of *Messrs. Carson & Brown*, with an oral argument by *Mr. John A. Carson*.

For respondent there was a brief with oral arguments by *Mr. Walter E. Keyes* and *Mr. Charles L. McNary*.

MR. JUSTICE HARRIS delivered the opinion of the court.

1. The Code confers authority for the appointment of a guardian to manage the estates of designated classes of persons, and unless S. T. Northcutt comes within one of those classes, it would not be proper to appoint another person to manage his affairs. Section 1319, L. O. L., provides that:

“The several County Courts, in their respective counties in this state, shall have power to appoint guardians to take care, custody, and management of the estates, real and personal, of all insane persons, idiots, and all who are incapable of conducting their own affairs. * * ”

Section 1319 recognizes different classes of mental incapacity just as other sections of the Code acknowledge degrees of mental weakness: *In re Sneddon*, 76 Or. 470, 479 (149 Pac. 527). The language of Section 1319 includes three classes of persons: (1) Insane persons; (2) idiots; (3) all who are incapable of conducting their own affairs. It is not contended that S. T. Northcutt is an insane person or an idiot, and therefore the inquiry is whether he is one of those persons “who are incapable of conducting their own affairs.” The legislature has defined the words “insane person,” in all statutes relating to guardians and wards, to include “every idiot, every person not of sound mind, every lunatic, and distracted person”; but there is no definition in this jurisdiction of the words “incapable of conducting their own affairs.” It becomes necessary, then, to ascertain the meaning of the

words last quoted before attempting to determine whether S. T. Northcutt comes within that class of persons. The term "incapable" signifies: Wanting in capacity for the purpose or end in view; personal lack of ability or power or understanding to perform duties or exercise privileges: Webster's Dictionary; Century Dict.; 22 Cyc. 40. While the definitions given by lexicographers tell us what is meant by the word "incapable" when used in the abstract, yet they do not furnish a gauge by which the degree of mentality possessed by any given person can be compared and measured so that we can know with reasonable certainty when that person has in fact become one of those who is incapable of conducting his own affairs. In California the legislature provided a test by which to determine whether any person is incapable of managing his own affairs. Section 1767 of the Code of Civil Procedure (3 Kerr's Cyc. Codes of Cal.) declares that the word "incapable"—

"shall be construed to mean any person who, though not insane, is, by reason of old age, disease, weakness of mind, or from any other cause, unable, unassisted, to properly manage and take care of * * his property, and by reason thereof would be likely to be deceived or imposed upon by artful or designing persons."

See, also, *Matter of Daniels*, 140 Cal. 335 (73 Pac. 1053).

The Supreme Court of Oklahoma was called upon to construe a statute of that state which authorizes the appointment of a guardian for any person who is "incapable" of managing his property, and that court adopted the California statutory definition, saying in the course of the reported opinion that:

"This definition in our judgment fairly expresses the meaning intended by our legislature": *Shelby v. Farve*, 33 Okl. 651, 655 (126 Pac. 764).

Another court has said that:

“A person may be of weak mind, and by reason thereof easily influenced, or dominated by others, so that, in the judgment of men, he ought not to be allowed to manage his affairs”: *In re Clark*, 175 N. Y. 139 (67 N. E. 212).

The much cited case of *Emerick v. Emerick*, 83 Iowa, 411 (49 N. W. 1017, 13 L. R. A. 757), holds that:

“Ordinarily a person who has sufficient mental capacity to make a valid agreement in regard to his property, and to manage it with reasonable care, unaffected by another’s will, should be permitted to retain it.”

The California statutory definition as well as the judicial interpretation of statutes like ours are substantially the same and afford a satisfactory test by which to gauge the legal fitness of a person to manage his own affairs; and therefore, if S. T. Northcutt is unable without assistance properly to manage and take care of his property, and would be likely to be deceived, dominated or imposed upon by artful or designing persons, then he is incapable of conducting his own affairs within the meaning of Section 1319, L. O. L. It must be remembered all the while, however, that a guardian cannot be appointed merely because a person does not manage his property judiciously: *Commonwealth v. Reeves*, 140 Pa. St. 258 (21 Atl. 315); *Emerick v. Emerick*, 83 Iowa, 411 (49 N. W. 1017, 13 L. R. A. 757).

2. S. T. Northcutt has been a resident of Marion County for many years, and now lives in the town of Turner. By his industry, thrift and business judgment he has accumulated considerable property. He is a widower, was about 77 years of age when the petition was filed, and he has cared for the daughter and her children and they have made their home with him during much of the time since she has been divorced.

He has bought and sold lands in Marion County, and about five or six years ago he purchased a large tract of land, and in two or three years afterward sold the property at a profit of about \$10,000. One witness referred to him as one who is "quite venturesome for a man of his age, and he is a live—what I would term a live business man," and "wants to be doing all the time." In October, 1913, Northcutt left for New Orleans for the purpose of investigating some property. Upon the advice of a business friend and a banker he took his money in the form of a letter of credit for \$6,000 or \$7,000 instead of carrying coin with him. While en route on the train he fell in with a woman and two men who were bunco steerers, and, while he denies that he lost his money, nevertheless we shall assume that the sharpers succeeded in relieving him of all or most of the money represented by the letter of credit. Upon his return to Turner, according to the testimony of the petitioner, a man named Harpool interviewed him about investing in land in Arizona, and at some time during the summer of 1914 one Manrod attempted to interest Northcutt in "some kind of a fertilizer" in Mexico. He did not invest, however, in the Arizona land nor in the fertilizer. The daughter testified that her father had been writing poetry ever since she was a little girl. A litterateur acknowledged that, while Northcutt's poetry "is in a class by itself," and while the poems "could be better," and "they won't compare with the best poets," yet "through them all runs a connective chain." The petitioner says that evidence of her father's incapacity is found in the fact that he has been known to arise between 2 and 4 o'clock in the morning and recite poems, and she especially emphasizes instances occurring in 1913 when he would in his imagination address the chairman of a

civic organization known as the Cherrians and rehearse poetry, occasionally interspersing the recital with the use of profane language. It turns out, however, that the Cherrians had offered a prize of \$10 for the best poem to be submitted, and, in his own peculiar way, Northcutt was only composing a poem to compete for the \$10. At one time he offered a poem to a moving-picture man to ascertain whether the verses could be used in the moving-picture business. Only a few weeks before the filing of the petition Northcutt went to Missouri and entered into a contract for the purchase of a section of land. So far as is disclosed by the evidence, the land is worth what he agreed to pay for it, and there is not even an intimation anywhere that he was overreached or dominated or influenced by anyone. He has also talked about the feasibility of erecting an electric lighting plant in the town where the section of land is located. He contemplates a change of residence with the hope that a change in climate will relieve him of catarrh. In view of his plan to move out of the state and buy land in Missouri, and possibly install an electric lighting plant, Northcutt intends to call in his loans so that he can use his money in the contemplated investments. He intends to marry a woman who is 58 years of age, and with whom he has been acquainted for about 20 years; and the evidence shows that she is an estimable and respectable woman, notwithstanding the opinion of the petitioner to the contrary. It may be that it is not best for a man 77 years of age to move away from the place where he has resided for many years and invest his money in land elsewhere, and possibly build a lighting plant, and, while one witness thought the withdrawal of his loans and the purchase of land in another state involved a risk, yet no witness ventured to say that the

proposed investments would prove unprofitable. In spite of his penchant for writing poetry, and although he may have been ambitious to have one of his poems dramatized, he has nevertheless made money even in his old age, because one witness gave it as his opinion that Northcutt "had made more money in the last five years than any man in Turner." Standing by itself, his experience with the three swindlers might suggest the propriety of appointing a guardian, but by the same token it would become advisable to conserve the estates of two witnesses who, when testifying, confessed to having been buncoed at one time, and yet each of them is recognized as a successful business man. There is no intimation of any person overreaching Northcutt in any transaction since 1913.

The petitioner said that she did not think her father was competent to manage his affairs. One witness thought that "it was hardly good judgment" for Northcutt to go away and invest heavily. Upon hearing of the perpetration of the swindle a nephew was of the opinion that Northcutt needed a guardian, but after seeing and talking with his uncle the nephew was convinced that a guardian was not necessary. Mrs. Frances Hubbard thought a guardian was needed, and John M. Watson testified about saying that "I thought it was foolish for a man of his age to speculate in land." In addition to the circumstances already narrated and the opinions of the witnesses mentioned, there was some evidence indicating that Northcutt practiced calisthenics while on the much-talked of New Orleans trip, and there was also some testimony about Northcutt saying that he intended to try to relocate an oil spring which he saw near Salt Lake years ago.

The mayor of Turner testified that Northcutt's business ability "compares favorably with most any man."

The cashier of the Turner State Bank said that Northcutt was competent, and Mr. McKinney thought that he was about as able to transact business as the average man. H. W. Smith stated that Northcutt was as capable of transacting business as the average man of his age. E. C. Baker, a hotel-keeper, considered "him one of the shrewdest men in Turner when it came to business." J. T. Cannon testified that: "I consider him as shrewd a man in business as there is in the country." Eight other witnesses said that he was competent to transact business. And finally Dr. L. F. Griffith, who has been employed at the state hospital for the insane since May, 1891, testified that while, generally speaking, it was not good business for an old man to engage actively in business, yet, after making an examination, he found Northcutt "quite remarkably preserved for a man of 77 years of age, both physically and intellectually," and that he was competent to transact business.

Without the evidence of the fraud practiced upon Northcutt in 1913, the records would be barren of any suggestions looking toward the advisability of appointing a guardian, but it is worthy of notice that no attempt was made to appoint a guardian upon his return in 1913, and it was not until a year afterward, when he planned to marry and talked of moving away and investing in land in Missouri, that the petition was filed. Moreover, some information of the motives prompting the guardianship proceedings is afforded by the frank admission of the petitioner that she objects to her father marrying the lady of his choice. She has no right, however, to say that her father shall not marry nor to say whom he shall marry: *Hogan v. Leeper*, 37 Okl. 665 (133 Pac. 190, 47 L. R. A. (N. S.) 475). It may not be judicious for Northcutt to marry,

or to move away, or to invest his money in Missouri, but he had a right to do so unless for some reason he is incapacitated. If men of competent judgment and who have known him for years are to be credited, then at the time of the trial Northcutt was not an incapable person within the meaning of the statute, even though his doings betray some of the foibles which frequently accompany old age.

The decree of the Circuit Court is affirmed.

AFFIRMED.

MR. CHIEF JUSTICE MOORE, MR. JUSTICE McBRIDE and MR. JUSTICE BRAN concur.

Argued October 4, reversed November 14, 1916.

TREADGOLD v. WILLARD.*

(160 Pac. 803.)

Judgment—Foundation—"Pleadings."

1. Pleadings are the formal written allegations by the parties of their respective demands and defenses, and are employed to state the ultimate facts, which, when uncontroverted, or when established by evidence at the trial, afford the foundation upon which a judgment or decree must necessarily rest.

Pleading—Supplying of Averment by Adverse Pleading.

2. In an action for rent, where the averment of the complaint respecting the description of the premises was defective, but the answer set forth a copy of the lease, giving a complete description, such answer remedied the defective state of the complaint, since, if a responsive pleading supplies material averments omitted by an adverse party, the question of who so makes the indispensable averment is unimportant, though the order of pleading may be irregular.

Appeal and Error—Harmless Error—Overruling Demurrer.

3. In an action for rent, where defendant's answer remedied the defective averment of the complaint in respect to lack of proper description of the land, the action of the court in overruling demurrer to the complaint was harmless.

*As to the question of estoppel of subtenant to question original landlord's title, see note in 7 L. R. A. (N. S.) 930. **REPORTER.**

Wharves—Estoppel to Deny Landlord's Title—Statute.

4. Under Section 798, subdivision 5, L. O. L., providing that a tenant is not permitted to deny the title of his landlord at the time of the commencement of the relation, the lessee of wharfage rights, by accepting the written agreement, was estopped from controverting his landlord's title while retaining possession of the rights secured by the lease.

Landlord and Tenant—Estoppel to Deny Landlord's Title—Termination by Surrender.

5. A tenant's estoppel to deny his landlord's title ceases when he surrenders to the landlord possession of the demised premises.

Landlord and Tenant—Estoppel to Deny Landlord's Title—Termination—Character of Surrender.

6. A tenant's relinquishment of possession of the demised premises to the landlord, which will terminate his estoppel to deny the landlord's title, must be complete, open and made in good faith.

Wharves—Lease—Realty Subject to Demise.

7. A wharf resting on piles driven into mud-flats was a part of the realty, which could be held under lease; so that taking possession of any part thereof under an agreement of lease created the relation of landlord and tenant.

Landlord and Tenant—Liability for Rent—Escape from.

8. A tenant who enters into possession of demised premises pursuant to the terms of the lease can escape liability for rent thereunder only by being evicted by the holder of the paramount title or by compulsory attornment to him, or, when notified of the assertion of such superior right, by surrendering possession to his landlord.

Appeal and Error—Injunction—Violation Pending Appeal—Prosecution for Contempt.

9. Where a corporation was enjoined from intermeddling with wharf property, the taking of an appeal from the decree, and the giving of supersedeas bond did not render it immune, while the appeal was pending, from prosecution for contempt for a violation of the injunction.

Wharves—Lease of Wharfage Rights—Occupation.

10. Where the lessee of wharfage rights, when notified that his landlord's title was in litigation, tied the raft on which he unloaded passengers and freight from his steamboat to another wharf, but such raft constantly rested against the leased wharf, to which it was attached by a gang-plank over which the passengers and freight were landed, such lessee took possession of and occupied the leased wharfage rights.

Trial—Direction of Verdict—Particular Finding of Fact.

11. When a cause is finally submitted, if it appears from the evidence received that one of the parties is entitled, as a matter of law, to a particular finding of fact, it is incumbent on the court, when so requested, to direct a verdict to that effect.

From Coos: JOHN S. COKE, Judge.

Department 2. Statement by MR. CHIEF JUSTICE MOORE.

This is an action by G. T. Treadgold against Frank E. Willard to recover money. The complaint charges that at all the times stated therein the Walker Warehouse Company was and is a corporation; that it on May 6, 1913, entered into an agreement with the defendant whereby, in consideration of his promise to pay \$10 a month in advance, the corporation permitted him to use and leased to him "certain valuable property," of which he then took possession, and continued to use for eight months; that on December 31, 1913, there was due under the agreement \$70 from him to the corporation when it for a valuable consideration assigned the account to the plaintiff, who ever since has been the owner thereof; and that the defendant has refused to pay any part of the money so due.

The amended answer admits the existence of the corporation, and that the defendant entered into a written contract with it, setting forth a copy thereof. It appears therefrom that the corporation leased to the defendant "from month to month all the wharfage rights belonging to the land lying in front of lot 2 in block 3 of Woodland Addition to Bandon, Coos County, Oregon, at and for the agreed price of \$10 per month, to be paid each month in advance." The writing also stipulated that either party might terminate the agreement by giving the other party 30 days' notice of an intention to do so. The remaining averments of the complaint are denied. For a further defense the answer sets forth a copy of the decree rendered by the Circuit Court of Coos County, Oregon, in the case of Chris Rasmussen against the Walker Warehouse Com-

pany, and alleges that by virtue of such determination the corporation had no wharfage or other rights which it undertook to lease, and by reason thereof could not enter into a valid agreement in respect thereto; that such wharfage rights were never owned by nor in possession of the corporation; that the defendant never became its tenant, and the pretended lease was without consideration; that about May 8, 1913, the defendant was advised of the decree by Rasmussen, who forbade him from interfering with such wharfage rights, and informed him that, if he intermeddled therewith, a suit would be instituted against him, whereupon the defendant notified the corporation thereof.

The reply denied the allegations of new matter in the answer, and averred that at the time the written agreement was signed the defendant knew the wharfage rights were in litigation, and on account thereof covenanted in the lease that upon its termination he would surrender possession of the premises peaceably; that an appeal from the decree specified was taken by the corporation, which thereupon entered into an agreement with Rasmussen whereby it was stipulated that pending a review of the cause the appellant's possession of the demised premises should not be disturbed; that upon an affirmance of the decree peaceable possession of the premises so leased was surrendered to that respondent, who then released the corporation from all liability, including the payment of wharfage; that Rasmussen never evicted Willard, nor did the latter attorn to him or any other person; and that in the eight months during which the defendant was in possession of the wharfage rights he recognized the corporation as his landlord, and expressly promised to pay to it the installments of rent as they severally matured.

Based on these issues, the cause was tried, resulting in a verdict and judgment for the defendant, and the plaintiff appeals. **REVERSED.**

For appellant there was a brief over the names of *Mr. G. T. Treadgold, Mr. C. R. Barrow, Messrs. Chatburn & Gardner* and *Mr. George C. Guthrie*, with an oral argument by *Mr. Treadgold*.

For respondent there was a brief and an oral argument by *Mr. William C. Chase*.

Opinion by MR. CHIEF JUSTICE MOORE.

It is maintained that an error was committed in denying a request to direct a verdict for the plaintiff on the ground that no testimony had been received tending to support the averments of the answer. It is insisted by defendant's counsel, however, that since the complaint did not particularly describe the premises alleged to have been leased, the primary pleading did not state facts sufficient to constitute a cause of action, which defect was not waived or remedied by answering over after a demurrer to the complaint interposed on that ground was overruled, and, this being so, no error can be predicated upon any action of the court occurring at the trial.

1, 2. Considering these questions in the inverse order, we find a text-writer saying:

"The declaration or complaint in an action for arrears of rent should allege a lease of described premises for a given term at a certain rent which defendant promised to pay and which has become due and remains unpaid": 24 Cyc. 1210.

See, also, *Kiernan v. Terry*, 26 Or. 494 (38 Pac. 671).

Pleadings are the formal written allegations by the parties of their respective demands and defenses, and are employed to state the ultimate facts which, when uncontroverted or when established by evidence at the trial of a cause, afford the foundation upon which a judgment or decree must necessarily rest. If a responsive pleading supplies material averments that have been omitted by an adverse party, so that the essential facts are thus set forth with sufficient particularity to uphold a judgment or decree based thereon, the question of who so makes the indispensable averment is unimportant, though the order of pleading may be irregular. Thus in 31 Cyc. 714, it is said:

“If a necessary allegation is omitted from a pleading, and the missing allegation is either alleged or admitted by the pleading of the adverse party the defect is cured.”

So, too, in *Dice v. McCauley*, 25 Or. 471 (36 Pac. 530), in referring to an ambiguity in the delineation of a border to real property, set forth in an initiatory pleading, Mr. Justice BEAN observes:

“The only uncertainty in the description contained in the complaint is the north boundary, and that is obviated by the answer.”

To the effect that omitted averments may be supplied by the allegations of an adverse party, see, also, *Turner v. Corbett*, 9 Or. 79; *Ferrera v. Parke*, 19 Or. 141 (23 Pac. 883); *State ex rel. v. Downing*, 40 Or. 309 (58 Pac. 863, 66 Pac. 917); *Catlin v. Jones*, 48 Or. 158 (85 Pac. 515); *Hornefius v. Wilkinson*, 51 Or. 45 (93 Pac. 474).

3. The answer herein admits the defendant entered into an agreement with the Walker Warehouse Company, and sets forth a copy of the lease which gives a

complete description of the demised premises. The defendant's pleading therefore remedies the defective averment of the complaint in respect to the lack of proper description of the land, and renders harmless the action of the court in overruling the demurrer.

Reviewing the refusal to direct a verdict for the plaintiff, the testimony shows that the Walker Warehouse Company, a corporation, claiming to be the owner of the tide-land in front of and abutting upon the north end of the lot described in the lease, built on such shoals a wharf the outer or north line of which extended to navigable water in the Coquille River. Chris Rasmussen, the owner of such lot, commenced a suit against the corporation to quiet his title to the premises, alleging in his complaint that the tide-land abutting thereon was a part thereof, and on November 16, 1912, he secured a decree enjoining those defendants and all persons claiming or to claim by, through, or under them, or either of them, from driving any piles between the north line of such lot and the ship channel in that river, and also restraining any interference with that plaintiff's rights or privileges in or to the tide-land, from which decree those defendants appealed. The corporation thereafter, and on May 6, 1913, leased to Willard the premises so described for the use of which he paid the first installment of rent in advance. The defendant made a small log raft, which, floating with the tides, rested against the north line of piling of the wharf, though the raft was fastened to a wharf immediately east of the one mentioned. The latter wharf and a warehouse thereon were also built by the corporation in front of and abutting upon lot 1 in block 3 of Woodland Addition to Bandon, which real property was owned by Mr. Kronenberg. From the raft to the west wharf the

defendant placed an incline, or gang-plank, over which passengers went and freight was carried to and from Willard's steamboat, and such means was used by him for that purpose eight months, and until the decree appealed from in the suit referred to was affirmed: *Rasmussen v. Walker Warehouse Co.*, 68 Or. 316 (136 Pac. 661). Thereupon the defendant herein was notified by the corporation to surrender possession of the leased premises. For seven months he never paid any rent and refused to make any remuneration on account thereof, whereupon the corporation assigned the claim to the plaintiff herein, who instituted this action to recover the remainder alleged to be due.

G. T. Treadgold testified that on May 6, 1913, when the lease was made, the Walker Warehouse Company was, and ever since the year 1911 had been, in possession of the wharf and the wharfage right in front of lots 1 and 2 in block 3 in the addition specified; that in the eight months during which the defendant occupied the demised premises pursuant to the terms of the written agreement he never denied his liability to the corporation or offered to surrender to it the possession of the property.

Chris Rasmussen, the party who secured the decree against the Walker Warehouse Company, testified that about May 6, 1913, the defendant herein applied to him for permission to use the wharfage right in front of lot 2, and was informed by the witness that the property was in litigation, and until a final decree was rendered nothing could be done by him in the matter. On cross-examination Mr. Rasmussen stated he did not tell the defendant he could not use the property, nor did the witness object to the steamboat being tied by Willard at that place.

The defendant testified that after making the agreement with the corporation he learned an injunction had been issued, whereupon he notified the agent of the Walker Warehouse Company of what he had been informed, and thereupon obtained from the agent of Mr. Kronenberg permission to tie his log raft to the east wharf; that the witness never took possession of any property under the terms of the written lease, and that he had never been evicted by Rasmussen.

4-8. Notwithstanding the sworn statements of this witness, which declarations seem to voice his opinion of the law governing his rights, the physical fact remains that for eight months he occupied the demised premises. By accepting the written agreement he is estopped from controverting his landlord's title while he retained possession of the wharfage rights which he secured by the lease: Section 798, subd. 5, L. O. L.; *Jones v. Dove*, 7 Or. 467; *Rouse v. Riverton Coal Co.*, 71 Or. 154 (142 Pac. 343). The estoppel ceases, however, when the tenant surrenders to the landlord possession of the demised premises: *Bertram v. Cook*, 44 Mich. 396 (6 N. W. 868). Such relinquishment must be complete, open and made in good faith, nothing short of which will suffice: *Hagar v. Wikoff*, 2 Okl. 580 (39 Pac. 281); *Shy v. Brockhause*, 7 Okl. 35 (54 Pac. 306). The west wharf leased by the corporation in this instance rested upon piles driven into the mud-flats, and hence the structure was a part of the realty which could be held in subordination to some superior. If, therefore, the defendant took possession under the terms of the agreement of any part of the west wharf, the relation of landlord and tenant was created between the parties: *Beck v. Grain Co.*, 131 Iowa, 62, 64 (107 N. W. 1032, 1033, 7 L. R. A. (N. S.) 930). In deciding that case Mr. Justice LADD says:

“The landlord may not have any interest in the title to the demised premises, but whether he has or not cannot be questioned by the tenant before the expiration of his lease, and whilst in possession under it, unless based upon some distinct and independent claim to the land.”

A tenant who enters into possession of demised premises pursuant to the terms of a lease can escape liability for rent thereunder only by being evicted by the holder of the paramount title or by compulsory attornment to him, or, when notified of the assertion of such superior right, by surrendering possession to his landlord: Jones, Land. & Ten., § 701. This author in that section of his work remarks:

“For a tenant who admits the execution of a lease to defend an action for rent, it is necessary for him to allege either that he had not entered under the lease, or that he had been evicted by a paramount title or that possession had been surrendered.”

In *George v. Putney*, 4 Cush. (Mass.) 351, 354 (50 Am. Dec. 788), Mr. Justice WILDE, speaking for the court, says:

“In an action for the recovery of rent reserved in a lease by the lessor against the lessee, the defendant is not allowed to plead *nil habuit in tenementis*; for he is estopped to deny the lessor's title, by whose permission he has entered upon and occupied the premises. And this is not a mere technical rule, but is conformable to the contract between the parties; for so long as the lessee is not disturbed in his occupation he is bound by the contract to pay the rent, whether the lessor's title be defective or not. But it is equally well settled that, if the lessee is disturbed in his occupation by a party having a title paramount to that of his lessor, so that he cannot legally continue his occupation under the lessor, without rendering himself liable as a trespasser to the other party, he may yield the possession, and take a new lease under him, or he

may abandon the possession; and in either case he will thereafter not be liable to pay rent to the original lessor. Such an entry and disturbance are equivalent to an ouster.’’

See, also, the notes to the case of *Hodges v. Waters*, 4 Ann. Cas. 106.

9, 10. The plaintiff's testimony shows that the Walker Warehouse Company was in the actual possession of the wharf in front of and abutting upon lot 2 in block 3 of Woodland Addition to Bandon, Oregon, on May 6, 1913, when the lease was executed, notwithstanding the corporation had been perpetually enjoined from intermeddling with the property. The taking of an appeal from that decree and the giving of a supersedeas bond did not render the corporation immune, while the appeal was pending, from prosecution for contempt for a violation of the injunction: 1 Joyce, Inj., § 283. No testimony was offered tending to substantiate or to deny the averment in the reply that the Walker Warehouse Company by agreement with Rasmussen was permitted to retain possession of the property leased to the defendant until final determination of the cause on appeal. In the absence of such proof, however, it is certain that Willard was never evicted, nor did he attorn to Rasmussen; neither did the latter object to the defendant's possession. Willard testified that he did not take possession of the wharfage rights so attempted to be leased, but fastened his log raft to the east wharf in front of and abutting upon Mr. Kronenberg's lot. This raft constantly lodged against the outer row of piling in the west wharf; such float evidently being kept in that position by the current in the Coquille River. It will be remembered that from the raft an inclined plank gangway extended to the west wharf whereby passengers

were permitted to pass, and freight was conducted to and from the defendant's steamboat to and over such wharf for the entire eight months during which Willard occupied the premises. Notwithstanding the defendant's testimony that he did not take possession of the wharfage rights under the terms of the lease, his sworn statement in this particular was evidently nothing more than a conclusion of law based upon the assumption that because the raft was fastened to the east wharf, and not to the west wharf, he did not occupy the latter. The physical fact that the raft constantly rested against the west wharf to which it was attached by the gang-plank overcomes his testimony, and conclusively shows he took possession of and occupied the wharfage rights so leased to him during the entire time specified.

11. When a cause is finally submitted, if it appears from the evidence received that one of the parties is entitled, as a matter of law, to a particular finding of fact, it is incumbent upon the court when so requested to direct a verdict to that effect: *Merrill v. Missouri Bridge Co.*, 69 Or. 588, 592 (140 Pac. 439, 441). In deciding that case Mr. Justice RAMSEY says:

"When there is no conflict in the evidence, and no dispute as to the material facts of the case, the question for decision is for the court, and under such a state of facts the court should direct the jury as to the particular verdict that they should find in accordance with the undisputed evidence."

See, also, the cases there cited in support of the language used.

A request having been made at the proper time for a directed verdict for the plaintiff, to which command the evidence shows he was unquestionably entitled, as a matter of law, an error was committed in denying such solicitation.

The judgment is therefore reversed, and the plaintiff will be awarded a recovery of the sum demanded in the complaint. **REVERSED. JUDGMENT RENDERED.**

MR. JUSTICE BENSON, MR. JUSTICE BURNETT and MR. JUSTICE MCBRIDE concur.

Submitted on brief November 1, affirmed November 14, 1916.

NORRIS SAFE & LOCK CO. v. WEAVER.*

(160 Pac. 807.)

Banks and Banking—Stockholders—Liability for Debts—Constitutional Provision.

1. The amendment to Article XI, Section 3, of the Constitution (Laws 1913, p. 8), adding thereto the provision that the stockholders of corporations and joint-stock companies conducting the business of banking shall be individually liable for the benefit of depositors to the amount of their stock at par, in addition to the par value of such shares, cannot be extended to include creditors of a bank for merchandise sold to it.

Constitutional Law—Obligation of Contracts.

2. An amendment to Article XI, Section 3, of the Constitution, adding to it the provisions that the stockholders of corporations and joint-stock companies conducting the business of banking shall be individually liable for the benefit of depositors to the amount of their stock at par in addition to the par value of such shares, cannot impair the obligations of a subscription contract made before its adoption and while Section 3 limited the liability of stockholders to the amount of their stock subscribed and unpaid.

Banks and Banking—Actions Against Stockholders—Pleading.

3. In an action to enforce, against alleged stockholders of a bank, payment of balance due on a judgment recovered by plaintiff against the bank, the complaint which did not show how many shares each subscribed, and how much remained unpaid upon his subscription, so that the court might know the extent of the award to be made against him, did not state a cause of action.

Malheur: DALTON BIGGS, Judge.

Question of impairment of obligation of contract by change of law in favor of creditor against stockholder is discussed in a note in 11 N. S. 1171. **REVERSED.**

In Banc. Statement by MR. JUSTICE BURNETT.

This is an action by the Norris Safe & Lock Company, a corporation, against J. R. Weaver and others, to enforce against alleged stockholders the payment of a balance due upon a judgment recovered by the plaintiff against their corporation. After stating the sale of a safe to the concern, the rendition of judgment for its price, the return of an execution but partially satisfied, the want of any other property of the debtor, and demand upon the defendants that they liquidate the remainder of the adjudicated claim, the complaint contains this averment, it being the only one charging the defendant:

“That on the said twenty-third day of November, 1911, and at and during the time when the said debts and liabilities of the Citizens’ State Bank of Ontario were contracted, accrued and incurred by the said corporation, and the safe sold to said corporation and accepted by the same, the defendants and each of the defendants was a stockholder in the said corporation to the amount of — shares of the capital stock of the said corporation, the Citizens’ State Bank of Ontario.”

The answer tendered the general issue as the sole defense. At the close of the case, the trial court directed a verdict for the defendants, and from the consequent judgment the plaintiff appeals.

Submitted on brief under the proviso of Supreme Court Rule 18: 56 Or. 622 (117 Pac. xi).

AFFIRMED.

For appellant there was a brief over the name of *Mr. George W. Hayes*.

For respondent there was a brief over the name of *Mr. C. McGonagill*.

MR. JUSTICE BURNETT delivered the opinion of the court.

1, 2. When the obligation was incurred, if at all, it was only to the extent of implied balances on their several subscriptions to its capital stock that stockholders could be made liable for the debts of their corporation. This is the principle enunciated in Article XI, Section 3, of the original state Constitution, reading as follows:

“The stockholders of all corporations and joint-stock companies shall be liable for the indebtedness of said corporation to the amount of their stock subscribed and unpaid, and no more.”

A different rule would make their association nothing more than a mere partnership, wherein each member is responsible for all just claims against it.

By the plebiscite of November 5, 1912 (see Laws 1913, p. 8), this part of the organic act was amended by adding to it this language:

“Excepting that the stockholders of corporations or joint-stock companies conducting the business of banking shall be individually liable equally and ratably and not one for another, for the benefit of the depositors of said bank, to the amount of their stock, at the par value thereof, in addition to the par value of such shares.”

Whatever may be the meaning of this provision it certainly cannot be extended to include those who are not depositors, but only creditors of the institution for merchandise sold to it. Neither can it be made to impair the obligation of a subscription contract made before its adoption so as to double the original liability. So far as the increased responsibility is concerned, the utmost effect it can have is to operate in favor of the depositors in a bank incorporated since the Constitution was so amended. Even then the only change is in

the amount and not in the basic principle of the claim against the stockholders.

3. In an action of this sort, therefore, it is necessary to show, among other things, not only for how many shares each defendant subscribed, but also how much remains unpaid upon his subscription, whether measured by the original or the amended constitutional rule, so that the court may be made aware of the extent of the award to be made against him. The complaint is utterly wanting in these particulars, and hence does not state a cause of action. For aught that appears, each defendant, if a stockholder, may have paid to the corporation the full par value of his subscription and an equal amount besides. Moreover, the testimony reported as part of the bill of exceptions reveals no more than that two of the defendants signed some kind of paper, which is not in evidence and the absence of which is not legally explained. No showing whatever is made of the organization of a corporation or the issuance of stock to anyone, so as to give rise to the accountability of a delinquent stockholder.

The judgment of the Circuit Court must therefore be affirmed. **AFFIRMED.**

Argued October 2, affirmed November 14, 1916.

LEVY v. NEVADA-CALIFORNIA-OREGON RY.*

(160 Pac. 808.)

Principal and Agent—Actions—Issues, Proof and Variances.

1. Under an averment that plaintiff himself made a contract with defendant railway, he could show that it was made through his agent, though the agent did not disclose that plaintiff was the principal.

*Authorities passing on the question of loss of profits because of inability of shipper to fill contract for sale of goods, as element of damages for carrier's breach of contract to furnish cars, are collated in notes in 26 L. R. A. (N. S.) 1191; 44 L. R. A. (N. S.) 643.

REPORTER.

Principal and Agent—Undisclosed Principal—Actions—Parties.

2. Though a contract was made by an agent who did not disclose his principal, the principal is the proper party in interest, and may maintain action for breach of the contract.

Carriers—Contracts—Breach—Damages—Measure.

3. As a general rule, damages for breach of a carrier's contract to supply cars may be predicated with reference to all that was in the reasonable contemplation of the parties in performance of the agreement.

Carriers—Contracts—Breach—Damages—Measure of.

4. Under a contract to supply cars for shipment of livestock, which the carrier broke by delay in supplying cars, knowing that the stock was intended for sale on the market in a distant city, the measure of damages is not the amount of depreciation at the point of shipment, but the depreciation in market value at the destination; that being within the reasonable contemplation of the parties.

From Lake: BERNARD DALY, Judge.

Department 1. Statement by MR. JUSTICE BURNETT.

This is an action by Henry Levy against the Nevada-California-Oregon Railway, a corporation.

The amended complaint contains four separate causes of action, the gravamen of each of which is that the plaintiff in one instance and his assignors in the others contracted with the defendant for the latter to furnish cars at a station on its railroad in which to ship livestock for the San Francisco market; but that in violation of the agreement the defendant failed to supply the cars until a later date, in consequence of which delay the stock to be transported depreciated in weight and quality to the damage of the shipper.

The defense against each count of the amended complaint consists in general denials, and the affirmative charge, in substance, that if the animals declined in condition, it was on account of the negligence of the person in charge failing to give them sufficient food and proper care while in the stockyards of the defendant awaiting shipment.

The new matter of the answer is denied by the reply. The jury rendered a verdict favorable to the plaintiff, and from the consequent judgment the defendant appeals.

AFFIRMED.

For appellant there was a brief over the names of *Mr. L. F. Conn* and *Mr. James Glynn*, with an oral argument by *Mr. Glynn*.

For respondent there was a brief over the names of *Mr. W. Lair Thompson* and *Mr. Arthur D. Hay*, with an oral argument by *Mr. Thompson*.

MR. JUSTICE BURNETT delivered the opinion of the court.

1, 2. Several assignments of error are predicated upon the fact that the court allowed testimony to the effect that the agreement with the defendant was made in each instance by an agent of the plaintiff who did not disclose his principal, the contention being that under the averment that the plaintiff entered into the contract it is not admissible to show that the compact was really made between the defendant and an agent of the plaintiff. The defendant's argument is that, in order for the undisclosed principal to recover on such a stipulation, it would be necessary to aver that the contract was made through an agent. This court has held to the contrary in *Kitchen v. Holmes*, 42 Or. 252 (70 Pac. 830), and *Smith Meat Co. v. Oregon R. & N. Co.*, 59 Or. 206 (117 Pac. 303). In other words, if the plaintiff alleges that he himself made the contract, it is permissible to prove that he did this by an agent. Cases like *Baker v. Eglin*, 11 Or. 333 (8 Pac. 280), to the effect that where A makes a contract with B for the benefit of C, the latter may bring an action upon

it, are not applicable in this instance. There the real party in interest was avowedly C, and he was entitled to litigate in his own name. In the present juncture if in fact the agreement was made by the agent acting for his principal, the latter is the real party in interest, and the proper one to conduct the litigation.

3, 4. Another class of errors assigned relates to the measure of damages. The defendant contends that it is the difference between the value of the stock at the point of shipment when offered for transportation and the reasonable worth of the same when the cars were actually furnished at the same place, while the plaintiff urges that it is the difference between what would have been the market value at the place of destination and the real worth of the stock at the time they arrived there. In brief, the defendant contends that the damages should be measured by conditions at the point of shipment, while the plaintiff maintains that they should be governed by the circumstances at the place of destination.

We note that the only cause of complaint is the delay in furnishing the cars where the stock was to be loaded as the parties had previously agreed upon. No charge is made that the animals were neglected or ill-treated en route to San Francisco. We observe, also, that it is alleged, and the evidence tended to show, that the cars were ordered for the transportation of the stock to the San Francisco market. The general rule is that damages may be predicated with reference to all that was in the reasonable contemplation of the parties in the performance of the agreement. It may be conceded that if the defendant had no knowledge or notice of the purpose for which the cars were to be used, or of the place to which the animals were to be forwarded, or of the purpose for which they were to be sent there,

the damages ought to be computed by the rule which the defendant suggests.

But here it is alleged and the evidence shows that it was within the contemplation of both parties that the cars were to be used to transport the stock to the San Francisco market; that is to say, they were to be taken there for sale. What injury, then, naturally flows from the neglect of the defendant to carry out its agreement? The delay, where the shipment originated caused a depreciation in the marketable condition of the animals, had its effect on their condition at their destination, and rendered them less valuable there. As stated in *Chattanooga So. Ry. Co. v. Thompson*, 133 Ga. 127, 131 (65 S. E. 285, 287), cited by the defendant:

“Ordinarily, in a suit by a shipper against a carrier, in case of injury to or loss of the property by the carrier’s fault, the carrier is required to make compensation on the basis of the value at the place of destination.”

In that case the court refused to apply that rule because in the agreement to furnish the cars there was no stipulation about any destination for the goods to be shipped in them. The court there properly decided that the damages should be computed as at the place of shipment, because there was no destination or particular market within the contemplation of the parties. In *St. Louis S. W. Ry. Co. v. Musick*, 35 Tex. Civ. App. 591 (80 S. W. 673), noted in the defendant’s brief, the trial court charged the jury thus:

“If you find for plaintiff, the measure of damages will be the difference, if any, between the market value of the cattle when they should have arrived at their destination and when they did arrive, and also such damages, if any, as said cattle may have sustained by the unreasonable and negligent delay on the part of

defendant in furnishing cars and shipping said cattle after said cattle had been received by defendant for shipment.”

The Court of Civil Appeals of Texas held this erroneous because it authorized double damages. In other words the two clauses of the charge were in legal effect duplicates, as the precedent is applied to the instant contention. Where there is a market value of property intended for sale, that is the standard by which depreciation of it must be measured, and that was the ultimate question to be determined in that case, no matter what was the cause of the decline. So here, the parties had in view the accomplishment of a certain plan by the plaintiff, namely, the delivery of sheep and lambs in San Francisco for market purposes. That which rendered them less valuable for that purpose is what would cause damage, and hence it was proper to instruct the jury to consider how much less they were worth than the market value by reason of the damage caused by the defendant's delay. The instruction of the court on that subject here follows:

“The damage in each cause of action in this case will be determined without any regard to rise or fall in the sheep or lamb market in San Francisco during the delay in furnishing cars alleged in each cause of action in the complaint, if you find there was any such delay, and without regard to any delay en route between the place where each shipment originated and its destination. The measure of damages, if any you find, will therefore be the difference between the reasonable market value of the livestock described in each cause of action set forth in the complaint at the time and in the condition such stock would have arrived in San Francisco if the Nevada-California-Oregon Railway had furnished cars according to the contract alleged in each cause of action, if you find such contract to have been made, and the decreased reasonable market value,

if you find there was any decrease, at the time and in the condition said livestock did arrive in San Francisco, taking into consideration only loss in weight and quality, if any, of the lambs or sheep, directly due to the delay, if any, of the defendant railroad in furnishing cars in which to move said stock, and without regard to any fluctuation in the price of lambs or sheep in the San Francisco market, or delay, if there was any, after the livestock was loaded on the cars. In other words, the damage, if any, is the loss in reasonable market value due solely to loss in weight or deterioration in quality of the lambs and sheep because of delay, if any, on the part of the defendant in furnishing cars, if you find defendant agreed to furnish cars as alleged. If you find plaintiff is entitled to recover damages from defendant, you will include in your verdict the reasonable value of any hay or feed necessarily fed to said livestock, and the reasonable value, if any, of necessary care and attention bestowed upon said livestock during the delay, if any you find, in providing cars for shipment, but in no event can you find for plaintiff damages in excess of the sum prayed for.”

The trial judge very carefully excluded from the consideration of the jury anything about fluctuations in the price of the stock and limited the jurors solely to the consideration of loss in weight or deterioration in quality of the stock caused by the delay of the defendant in furnishing the cars as agreed. Other cases applicable are *McManus v. Chicago & Great Western Ry. Co.*, 156 Iowa, 359 (136 N. W. 769); *Texas & Pac. Ry. Co. v. Nicholson*, 61 Tex. 491; *Newport News etc. Co. v. Mercer*, 96 Ky. 475 (29 S. W. 301); *New York etc. R. R. Co. v. Estill*, 147 U. S. 591 (37 L. Ed. 292, 13 Sup. Ct. Rep. 444).

The following precedents cited by the defendant are distinguishable: *Richey v. Northern Pac. Ry.*, 110 Minn. 347 (125 N. W. 897), was where no place of destination was mentioned, and it was held that the damages must

be governed by conditions at the place of shipment. In *Gulf, C. & S. F. Ry. v. Hume*, 87 Tex. 211 (27 S. W. 110), it was held that if the shipment of stock is not made for a certain market, but for pasturage only at the point of destination, the damage is referable to the decline in intrinsic rather than market value of the chattels caused by the delay. In other words, the element of market conditions was not within the contemplation of the parties. *Galveston, H. & S. A. Ry. Co. v. Thompson* (Tex. Civ. App.), 44 S. W. 8, was also a case where stock was shipped to pasture and not to market. *Dawson v. Quincy etc. R. Co.*, 138 Mo. App. 365 (122 S. W. 335), was an instance where the plaintiff shipped two carloads of cattle from Trindle, Missouri, to Chicago. The train was delayed in arrival. The trial court instructed the jury that the defendant was liable: (1) For any loss to plaintiff occasioned by decline in the market at Chicago between the time plaintiff's cattle should have arrived and the time they did arrive; (2) for any shrinkage in the weight of the cattle over and above what was ordinary and usual in such cases; (3) for any loss to plaintiff occasioned by the stale appearance of the cattle caused by the delay. The Kansas City Court of Appeals held that this was a correct statement of the law, but that as to the first and third elements there was no proof, and consequently reversed the case, but it will be observed that it expressly recognized as an element of damages the shrinkage in the weight of the cattle caused by the delay of the carrier. *Southern Kansas Ry. Co. v. O'Loughlin Land & Cattle Co.*, 60 Tex Civ. App. 91 (127 S. W. 568), was a case where the transportation company refused to deliver the cars for so long a time that the owner was compelled to sell the goods at the place of shipment. Under those circum-

stances, there being no transportation whatever, the court held that the measure of damages was the difference between the market value at the destination and the same value at the shipping point less freight. There the feature of the stock arriving at the market was not open for consideration, because it was utterly absent.

In the present juncture, if nothing else were shown, we might well say that the failure to furnish cars at the appointed time worked out its full hurt at the point of shipment; that it accomplished there all it could in depreciation of the intrinsic worth of the animals; that it could have no subsequent effect upon them; and that, hence, the damage must be assessed according to their lessened value where they were delivered to the carrier. This, however, leaves out of view the feature that cars were to be furnished to carry the sheep to a specified market, not, indeed, to meet a certain price prevalent there on a particular day, but still to be sold there. That was the end to be attained, and it was known to the defendant. It contracted accordingly. Any shortcoming of the carrier, therefore, alleged and established, which operated to impair the plaintiff's fruition of the purpose taken into account by both parties to the agreement, constitutes ground for damage. The remedy ought to correspond in scope with the previously known plan which the defendant disarranged by its failure to co-operate as it promised.

Here we have within the contemplation of the parties the purpose of making the shipment to the San Francisco market. We have not only the delay of the defendant to supply the cars for that purpose, but we also have present the fact that later on the stock was actually transported to the destination. The measure of damage naturally flowing from these cir-

cumstances is the difference between the value of such stock in the condition in which they would have arrived at San Francisco if the cars had been furnished promptly as agreed and their actual value in the condition in which they did arrive. The other errors complained of either were not assigned, or were not presented in the brief; hence they must be considered as waived.

The judgment is affirmed.

AFFIRMED.

MR. CHIEF JUSTICE MOORE, MR. JUSTICE BEAN and MR. JUSTICE HARRIS CONCUR.

Motion to dismiss appeal allowed November 21, 1916.

BELL v. FLEMING.

(160 Pac. 1150.)

Appeal and Error—Record—Time for Filing—Evidence.

1. Where an appeal was perfected in accordance with Section 550, subdivision 4, L. O. L., on April 19th, the trial court had no authority, under Section 554, requiring the transcript to be filed within 30 days after the appeal is perfected, to enter an order on May 27th extending the time to file the transcript.

From Multnomah: HENRY E. MCGINN, Judge.

This is an action by Seymour H. Bell against J. C. Fleming, in which plaintiff obtained a judgment and defendant appeals. Respondent moves to dismiss the appeal on the ground stated in the opinion of the court. Motion allowed and appeal dismissed. **DISMISSED.**

Mr. Leon W. Behrman and Mr. Maurice W. Seitz,
for the motion.

Mr. Cicero M. Idleman, contra.

Opinion PER CURIAM.

This is a motion to dismiss an appeal on the ground that an order of the trial court enlarging the time within which to file the transcript on appeal was not made while that court retained jurisdiction of the cause. An inspection of the papers sent up in this cause shows that on February 15, 1916, the plaintiff secured a judgment against the defendant; that on April 4th following a notice of appeal was served and filed by defendant's counsel, who 10 days thereafter also served and filed an undertaking on appeal. No objections to the sufficiency of the sureties on the undertaking appear to have been made, and hence the appeal became perfected April 19, 1916: Section 550, subd. 4, L. O. L. The appellant was allowed thereby 30 days from the latter date, or until May 19th, in which to file his transcript on appeal: Section 554, L. O. L. The order extending the time in which to file the transcription was not made until May 27, 1916.

The trial court had lost jurisdiction of the cause, and hence the motion is allowed. **DISMISSED.**

Argued October 30, appeal dismissed November 21, 1916.

FRENCH v. McKEAN.

(160 Pac. 1151.)

Appeal and Error—Proceedings to Transfer Cause—Notice of Appeal—Persons Entitled—"Adverse Party."

1. Under Section 550, L. O. L., requiring notice of appeal to be served on such adverse party or parties as have appeared, an appeal by a defendant from a decree enjoining enforcement of the judgment will be dismissed where a codefendant of the appellant who would be compelled to pay the judgment in case of reversal of the decree appealed from is not served with process; an "adverse party," within Section 550, being one whose interest in relation to the judgment or decree is in conflict with the modification or reversal sought by the appeal.

From Sherman: DAVID R. PARKER, Judge.

This is a suit in equity by L. R. French against J. C. McKean, as sheriff of Sherman County, Oregon, George E. Quiggle, S. Schupbach, C. E. Johnson and W. L. Cooper, in which the plaintiff was successful in securing a decree, and the defendant W. L. Cooper appeals. At the trial on the merits, the plaintiff-respondent moves to dismiss the appeal on the ground set forth in the opinion of the court.

APPEAL DISMISSED.

For respondent there was a brief over the names of *Mr. John B. Hosford* and *Mr. Roy J. Baker*, with an oral argument by *Mr. Hosford*.

For appellant there was a brief and an oral argument by *Mr. W. L. Cooper, in pro. per.*

In Banc. MR. JUSTICE BEAN delivered the opinion of the court.

At the threshold of the case counsel for plaintiff challenge the jurisdiction of this court to review the decree appealed from, for the reason that the notice of appeal was not served upon all of the adverse parties who have appeared in the suit. It appears from the record that plaintiff, French, instituted a suit and obtained a decree in the Circuit Court of the State of Oregon for Sherman County against all of the defendants herein, declaring a certain judgment and decree in favor of C. E. Johnson, plaintiff therein, and against L. R. French, Harriet E. French, George E. Quiggle, S. Schupbach, Sarah Schupbach, W. C. Repass, Florence Repass; Emil Thielhorn, H. G. Kemp, Ben Kivich, Sarah Kivich, and Sam Chavis, defendants therein, for the sum of \$500, with interest at 10 per cent per

annum and \$150 attorney fees and \$31.25 costs, fully paid and satisfied, and enjoining the enforcement thereof on execution; that by the decree so enjoined it was provided for a sale of real estate upon the foreclosure of a mortgage, and further decreed that the plaintiff therein have execution against L. R. French, Geo. E. Quiggle, S. Schupbach, H. G. Kemp and Ben Kivich for any balance that remained unpaid after the application of the proceeds of such sale.

In the present suit upon this appeal the notice was served upon plaintiff, L. R. French, but was not served upon any of the defendants. Section 550, L. O. L., provides in so far as it is here applicable:

“An appeal shall be taken and perfected in the manner prescribed in this section, and not otherwise. * * If the appeal is not taken at the time the decision, order, judgment, or decree is rendered or given, then the party desiring to appeal may cause a notice, signed by himself or attorney, to be served on such adverse party or parties as have appeared in the action or suit, or upon his or their attorney, at any place in the state,” etc.

S. Schupbach appeared and filed an answer in the cause, and plaintiff contends that notice of appeal should have been served upon this defendant. The judgment enjoined by the decree appealed from was against Schupbach, and if the decree should be reversed and the judgment reinstated Schupbach's interest would be affected, as according to the adjudication he would be required to pay the amount, and the notice of appeal should have been served upon him.

An adverse party, within the meaning of Section 550, L. O. L., is a party whose interest in relation to the judgment or decree is in conflict with the modification or reversal sought by the appeal: *Conrad v. Pacific Packing Co.*, 34 Or. 342 (49 Pac. 659, 52 Pac. 1134,

57 Pac. 1021); *Lillienthal v. Caravita*, 15 Or. 339 (15 Pac. 280); *Alliance Trust Co. v. O'Brien*, 32 Or. 333 (50 Pac. 801, 51 Pac. 640). This is a jurisdictional matter, and the court has no discretion to exercise: *Lane v. Wentworth*, 69 Or. 245 (133 Pac. 349). It was said in the latter case:

“It has constantly been determined by this court that, although parties are both plaintiffs or both defendants, yet if an appeal would unfavorably affect the rights of one of them, as determined by the decree appealed from, he is an adverse party as respects his coplaintiff or codefendant, and that the jurisdiction of this court depends upon service of the notice upon all such parties.”

The fact that Schupbach claimed to be interested in the suit in another capacity would not change his status as to the judgment.

The appeal is dismissed.

DISMISSED.

Argued September 27, reversed and dismissed November 21, 1916.

MOFFITT v. SALEM.

(160 Pac. 1152.)

Municipal Corporations—Recovery of Benefit Assessment—Voluntary Payment.

1. Where plaintiff paid a benefit assessment to have the lien on his lots discharged so that he might make a sale of the property, and he was not entrapped by sudden pressure of city's agent into making the payment, and was not without other remedy, his payment was voluntary.

Municipal Corporations—Public Improvements—Assessment of Benefits—Refund—Parties Entitled.

2. Plaintiff voluntarily paid a benefit assessment, under an agreement with the city treasurer to return it if illegal, and, the assessment being declared void, City Charter of City of Salem, Section 52, was amended to authorize the return of the assessment to the record owners of property when the amendment was adopted. *Held*, that the right to recover money voluntarily paid in discharging a void

tax must be found in a statute or ordinance authorizing it, and the agreement with the city treasurer was invalid, and therefore plaintiff's grantees, and not plaintiff, were the proper parties to receive the money.

[As to recovery by taxpayer of taxes paid, see notes in 22 Am. Dec. 519; 45 Am. Dec. 164; 94 Am. St. Rep. 425.]

From Marion: PERCY R. KELLY, Judge.

Department 2. Statement PER CURIAM.

This is an action by A. T. Moffitt against the City of Salem.

The complaint charges:

"That at all times hereinafter mentioned defendant, the City of Salem, was and now is a municipal corporation, duly and regularly incorporated, organized and existing under and by virtue of the laws of the State of Oregon; that on and between the thirteenth day of October, 1911, and the tenth day of November, 1911, defendant received from A. T. Moffitt the sum of \$115.44, to and for the use of plaintiff; that thereafter and prior to the commencement of this suit plaintiff duly demanded payment thereof from the defendant, but said defendant failed, neglected and refused to pay the same to plaintiff or any part thereof."

The answer admits the incorporation of the defendant, but denies all other allegations above set forth. For a further defense it is stated that the defendant is a municipal corporation; that its common council enacted and the mayor approved ordinances numbered 821 and 876 the twenty-seventh day of June, 1910, and the nineteenth day of December, 1910, respectively, levying a special assessment within a specified district for the construction of the South Salem sewer, and laying upon lots 3 and 4 in block 19 of Nob Hill Addition to Salem, Oregon, then owned by the plaintiff, a burden of \$115.44 for benefits conferred by the improvement, which sum was entered in the Docket of City Liens on the twenty-ninth day of December, 1910;

that thereafter the validity of that assessment was contested in the courts, and before a final decision was rendered in the suit the plaintiff voluntarily paid to the defendant the sum so assessed, and the lien was discharged. For a further defense it is alleged that the assessment for the construction of that sewer was ultimately determined to have been irregular, whereupon the charter of the City of Salem was amended, pursuant to which municipal bonds were issued by the defendant, sufficient in amount to defray the entire cost of the improvement; that prior thereto the plaintiff sold and conveyed the lots described in the complaint to C. Pemberton and his wife, who thereafter received from the defendant the payment so made by the plaintiff and interest thereon, amounting to \$129.83.

The reply controverted all the allegations of new matter in the answer, except that when the plaintiff paid the assessment he had an opportunity to sell the lots, in case he would procure the lien thereon to be discharged, without which release the purchasers refused to accept a conveyance. It asserts that the assessment was paid under protest in order to remove a cloud from the title to the lots, and that the money paid for that purpose was taken into consideration by the plaintiff and the purchasers of the real property. For a further reply it is stated that the defendant ought to be estopped from alleging or proving the defense set forth on the ground that when the assessment was paid it was agreed by and between the plaintiff and the defendant's officer who received the money that if the assessment should be decreed to be illegal the sum so received should be returned to Mr. Moffitt. By stipulation the cause was tried without a jury, and findings of fact and of law were made, and judgment

was given to the plaintiff for \$115.44, with interest from November 10, 1911, and the defendant appeals.

REVERSED AND DISMISSED.

For appellant there was a brief over the names of *Mr. Bert W. Macy*, *Mr. William H. Trindle* and *Mr. Rollin K. Page*, with an oral argument by *Mr. Macy*.

For respondent there was a brief and an oral argument by *Mr. Walter C. Winslow*.

Opinion PER CURIAM.

The only question to be considered is whether the findings of fact support the conclusion of law and the judgment founded thereon. The findings of fact accord with the material averments of the complaint, of the answer and of the reply. These findings further state that ordinances numbered 821 and 876 of the defendant were duly enacted and approved, pursuant to which a sewer was constructed in South Salem, and by reason thereof there was imposed on lots 3 and 4 in block 19 of Nob Hill Addition to Salem, Oregon, then the property of the plaintiff, a burden of \$115.44, which sum was entered in the Docket of City Liens; that the validity of that assessment was challenged in a suit instituted for that purpose; that pending the decision of that cause the plaintiff had an opportunity to sell the lots, but the proposed purchasers would not accept a conveyance of the land until the lien was discharged; that the plaintiff paid the sum stated to the city treasurer pursuant to an agreement with him that if it should be finally determined that the assessment was invalid the sum so received would be returned to *Mr. Moffitt*; that on the twenty-fifth day of October, 1911, the plaintiff and his wife executed to the pur-

chasers, C. Pemberton and wife, a deed to the lots; that thereafter it was finally determined that the assessment was illegal (*Jones v. Salem*, 63 Or. 126, 123 Pac. 1096); that Section 52 of the City Charter was amended the second day of December, 1912, so as to authorize the defendant's council to issue and sell bonds, and from the money thus obtained to refund the sums collected on account of the assessment, and also to pay the contractors the remainder due for making the improvement. A clause of that amendment reads:

"(e) That upon the adoption of this amendment and the passing and adoption by the qualified voters of the City of Salem of an ordinance providing for the issuance of bonds or warrants for the payment of sewers and drains heretofore constructed, and for the refunding of outstanding bonds or warrants issued by the city for such purposes, and for the repayment of any and all special assessments levied on said account, the city council shall proceed to issue and sell said bonds as provided by law, and as may be hereafter provided by ordinance, and from the funds derived from the sale thereof shall repay to all property owners who have heretofore paid into the city treasury by themselves or their grantors such sum or sums as may have been from time to time paid by themselves or their grantors on account of the special assessment levied against any property to which said person holds the record title at the date of the adoption of this amendment, for the construction of sewers or drains."

The court further found that ordinances were enacted and approved carrying into effect that amendment; that pursuant to the provisions of those ordinances C. Pemberton and his wife filed their claim for the money so paid by their grantor, and thereupon the same, with interest thereon amounting to that thereafter the plaintiff demanded of the defendant a return of the money which he had paid,

but upon a refusal to comply therewith he instituted this action.

1. Unless the city treasurer was authorized to make a valid agreement on behalf of the defendant to return the money to the plaintiff in case the assessment was declared to be illegal, the findings of fact do not uphold the conclusion of law and the judgment, and C. Pemberton and his wife, the holders of the legal title to the lots December 2, 1912, when Section 52 of the charter was amended, were the proper parties to receive the money: *Neer v. Salem*, 77 Or. 42 (149 Pac. 476).

The plaintiff paid the assessment in order to have the lien on the lots discharged so that he might make a sale of the property. He was not entrapped by sudden pressure of the defendant's agents into making the payment, nor was he without other means of escaping an existing or imminent infringement of his rights of person or property. His payment was voluntary: *Johnson v. Crook County*, 53 Or. 329 (100 Pac. 294, 133 Am. St. Rep. 834); *Tillamook City v. Tillamook County*, 56 Or. 112 (107 Pac. 482).

2. The right to recover money paid by a person of his own accord in discharging a void tax must be found in a statute or ordinance authorizing the repayment: *Board of Commrs. v. Ruckman*, 57 Ind. 96, 98. In deciding that case Mr. Justice WORDEN, in speaking of the voluntary payment of an illegal tax, says: "Without some statutory provision, taxes thus paid cannot be recovered back." Before the amendment of Section 52 of the charter the city treasurer could not make any valid agreement to repay the assessment voluntarily made, and for that reason the findings of fact do not support the conclusion of law.

The judgment is reversed and the action dismissed.

REVERSED AND DISMISSED.

Argued October 11, reversed and remanded November 21, 1916.

CAPLES v. MORGAN.

(160 Pac. 1154.)

Pleading—Amendment—Surprise.

1. In action by landlord for rent installments, where defendant counterclaimed for being induced by false representations to execute a lease of the premises for enhanced rental, allowing defendant during trial over plaintiff's objection, to amend his answer so as to call his claim a setoff and recoupment instead of counterclaim, and to change the prayer to one that plaintiff take nothing and defendant be dismissed, was not error; it not being shown that plaintiff was surprised or her rights prejudiced thereby.

Limitation of Actions—Defenses—Fraud.

2. The statute of limitations cannot be urged against a mere defense, such as that defendant was fraudulently inveigled into the contract sued on, but such a defense lasts as long as the contract it affects; the statute of limitations applying only to one who seeks affirmative relief.

Landlord and Tenant—Action for Rent—Questions for Jury—False Representations.

3. In action for rent, where defendant sought to recoup damages for being induced by false representation to execute the lease for a higher rental than he would otherwise, the issue whether the false representation did have the effect of inducing defendant to agree to the higher price was for the jury's determination.

Landlord and Tenant—Action for Rent—Recoupment.

4. In an action for rent, that the tenant, by false representations of the landlord's agent that another party was seeking a lease of the premises at a higher price, was induced to execute the lease at such higher price, was a good defense by way of recoupment.

Setoff and Counterclaim—"Recoupment"—Nature.

5. "Recoupment" is the keeping back or stopping something which is due, and under the principles of the common law, recoupment could be invoked when defendant sustained damages from plaintiff's non-performance of the contract sued on, in which case the damages to which the defendant was entitled could be abated from plaintiff's claim.

Frauds, Statute of—Leases—Term for Years—Oral Negotiations.

6. In an action for rent on five-year lease, where defendant sought recoupment of damages from false representation of plaintiff's agent that another party desired the lease at a higher price, inducing defendant to execute the lease at such higher price, the oral negotiations of the parties concerning the lease were inadmissible under Section 808, L. O. L., providing that leases for a longer period than one year are void if not in writing, and no evidence of such agree-

ment shall be received other than the writing, or secondary evidence of its contents, in the cases prescribed by law.

Fraud—Damages—Difference Between Liability Incurred for Rent and Rental Value of Premises.

7. Where a tenant was induced to take a five-year lease of an apartment house at \$10 instead of \$8 per room per month, by false representation of landlord's agent that another party had offered to take the lease for the higher price, and set up such claim in recoupment in action by the landlord for installments of the rent, the measure of his damages was the difference between the agreed rent and the reasonable value of the premises as of the date the contract was made.

From Multnomah: CALVIN U. GANTENBEIN, Judge.

Department 2. Statement by MR. JUSTICE BURNETT.

This is an action by Jane Caples against W. L. Morgan to recover sundry monthly installments of rent alleged to be due upon a five-year lease of real property in Portland, the execution of which and possession thereunder being admitted.

That anything is due is denied. Answering affirmatively, the defendant alleged, in substance, that he was the principal stockholder in a firm of architects engaged in the business of building apartment houses and family dwellings; that oral negotiations were entered into between the defendant and the agent of plaintiff for the erection upon the real property of the latter of an apartment house containing 71 rooms, to be leased to the defendant for the term of five years at the rate of \$8 per room per month; that before the negotiations were completed and the lease finally executed the plaintiff's agent falsely represented to the defendant that a third party had offered to take a lease for that term at the rate of \$10 per room per month, in which event, if accepted, the defendant firm would not be allowed to construct the building; that this representation was made for the purpose of inducing the defendant to agree to the larger rental; that, rely-

ing upon the statement mentioned, and believing it to be true, the defendant agreed to the lease in question at the larger rental, and as he says, "will be obliged for the remainder of the term of said lease to pay the sum of \$2 per room per month more than he had agreed with said agent to pay for the same, or than said plaintiff was offered for same, or could have then or now receive from any other person therefor, or than same was then or is now worth, and defendant was, has been, and is damaged by reason thereof and thereby in the sum of \$8,520.'" A demurrer to the further and separate answer on the ground that it did not state facts sufficient to constitute a cause of defense to the complaint or counterclaim against the plaintiff, and that the defendant's cause of action set forth as a counterclaim did not accrue within two years prior to the commencement of this action nor within two years prior to the filing of the counterclaim, was overruled.

Every allegation in the new matter of the answer was denied by the reply, except as expressly admitted therein. It admits that the agent was authorized to negotiate for and find a tenant for an apartment house to be erected on the property, and to negotiate for proposals to construct the same, but that he was not authorized to enter into such a lease, nor to conclude the contract for the construction of the building; that the defendant proposed to the agent to take a lease on the building to be erected for five years on the basis of \$8 per room per month, but that the proposal was never accepted. It also admits that the agent represented that the third party had made an offer for a lease running for the same term at \$10 per room per month, and avows that the plaintiff is informed and believes, and therefore alleges, that the offer had, in fact, been made; and, lastly, affirmatively avers the defense of

the statute of limitations, for that it appears that the alleged fraud was perpetrated April 11, 1910, whereas the answer was not filed until more than two years after that date.

A general demurrer to the new matter in the reply was sustained, apparently on the ground that the questions involved had been settled by the ruling on the demurrer to the allegations of the answer. During the progress of the trial, over the objection of the plaintiff, the defendant was allowed to amend his answer so as to call it setoff and recoupment instead of counterclaim, and by changing the prayer to the effect that the plaintiff take nothing and defendant be dismissed with his costs and disbursements. The jury found a special verdict to the effect that the statement of the agent that the third party had offered \$10 per month was false, that defendant in taking the lease relied upon that offer, and that but for the offer he would have secured it at a rental of \$575 per month for the whole building; and as a general verdict the jury found for the defendant. From the judgment rendered on this verdict, the plaintiff appeals.

REVERSED AND REMANDED.

For appellant there was a brief over the names of *Mr. Martin L. Pipes* and *Messrs. Flegel, Reynolds & Flegel*, with oral arguments by *Mr. Pipes* and *Mr. John W. Reynolds*.

For respondent there was a brief over the names of *Messrs. Bauer & Greene, Mr. A. H. McCurtain* and *Messrs. Malarkey, Seabrook & Dibble*, with oral arguments by *Mr. Thomas G. Greene* and *Mr. Ephraim B. Seabrook*.

MR. JUSTICE BURNETT delivered the opinion of the court.

J 1. Complaint is made about permitting the amendment of the answer. It is not shown, however, that the plaintiff was taken by surprise or that her rights were prejudiced thereby. She could not have experienced any injury on that account; for, whereas the original answer demanded a judgment for the excess of the damages alleged over what should be found due to the plaintiff by the terms of the lease, the change allowed her to escape any judgment for this possible overplus.

2. Neither can the statute of limitations be urged against a mere defense of the kind here involved. Our statute stating the time within which actions may be brought refers to instances where the party claiming to have been defrauded institutes proceedings on his own behalf for the recovery of damages. It does not contemplate mere resistance of a claim founded upon a contract into which the defendant has been inveigled by the fraudulent conduct of the other contracting party. The rule is thus stated by Mr. Justice HENSHAW in *Hart v. Church*, 126 Cal. 471 (58 Pac. 910, 77 Am. St. Rep. 195):

“It is also true that, where a party seeks relief upon the ground of fraud or mistake, the action must be commenced within three years after the discovery of the facts constituting the fraud or mistake; but a different case is presented where the party who has procured the fraudulent contract, or who seeks to take advantage of it, asks to have it declared valid or to enforce its executory terms, and is thus himself asking affirmative relief. The three-year statute of limitations does not bar the defendant in such a case from objecting to the validity or to the enforcement of the contract upon the ground of fraud. It is not incum-

bent upon one who has thus been defrauded to go into court and ask relief, but he may abide his time, and, when enforcement is sought against him, excuse himself from performance by proof of the fraud.”

To like effect are the cases of *Evans v. Duke*, 140 Cal. 22 (73 Pac. 732); *State v. Tanner*, 45 Wash. 348 (88 Pac. 321); *Advance Thresher Co. v. Doak*, 36 Okl. 532 (129 Pac. 736). The injured party is not bound to presume that his adversary will at all events endeavor to enforce the contract which is corrupted with his own fraud, at least beyond what would be justly his due. A wronged individual may safely rest on a mere defense grounded upon the deceit of the other party so long as the contract itself is liable to be enforced. The taint is inherent in the agreement, and as a defense will last as long as the convention it affects.

The most difficult question to be determined is whether or not the false representation that the third party had offered \$10 per month is material and vitiates the contract or is a basis of damage *pro tanto*. That the representation was false is established by the special verdict of the jury beyond our power to investigate. So far as the precise question thus presented is concerned, it is new in this state. There are many authorities which sustain the position of plaintiff. The argument is stated in *Williams v. McFadden*, 23 Fla. 143 (1 South. 618, 11 Am. St. Rep. 345), as follows:

“To entitle a party to maintain an action for deceit by means of false representations, he must, among other things, show that the defendant made false and fraudulent assertions in regard to some facts or facts material to the transaction in which he was defrauded, by means of which he was induced to enter into it. The misrepresentation must relate to alleged facts, or

to the condition of things as then existent. It is not every misrepresentation relating to the subject matter of the contract which will render it void or enable the aggrieved party to maintain an action for deceit. It must be as to matters of fact, substantially affecting his interests, not as to matters of opinion, judgment, probability or expectation"—citing 3 Sutherland on Damages, 484, and *Long v. Woodman*, 58 Me. 49.

The reasoning seems to be that the representation does not affect or pretend to affect the intrinsic qualities of the property under consideration; that the statement of the offer of the third party is but another way of saying that he has an opinion that the value is so much; that opinions are not material, and may be set down as "trader's talk." A fair statement of the rule relied upon by the plaintiff is found in *Beare v. Wright*, 14 N. D. 26 (103 N. W. 632, 8 Ann. Cas. 1057, 69 L. R. A. 409):

"It is apparent that the representation as to what others paid for the stock did not affect its value. It has not been found that there were any fiduciary relations existing between the parties, or that there were any other facts or circumstances giving rise to an implied agreement that the price paid by the vendor or others should be the price to the plaintiff. It is not found or admitted that there was any express contract to that effect. In the absence of special circumstances of that nature, a mere false statement as to the price paid by the vendor or others is not actionable deceit"—citing many authorities.

Again, in *Cole v. Smith*, 26 Colo. 506 (58 Pac. 1086), the court, speaking by Mr. Chief Justice CAMPBELL, says:

"While a statement by the vendor that property cost him a certain sum of money is not a mere expression of opinion, but a statement of fact which, if relied upon and proved to be false, may be a ground for re-

scinding a contract entered into upon the faith of it, it is quite uniformly held that a statement by a vendor that he has been offered a certain sum for his property, or that it is of any given value, are not such representations of fact as to be the foundation of an action."

In *Dingle v. Trask*, 7 Colo. App. 16 (42 Pac. 186), a creditor of a merchant falsely stated to him that another creditor was about to attach the property of the merchant, and so induced the latter to give him a mortgage upon his goods. The court held that this false statement did not constitute ground for an action of deceit looking to the cancellation of the mortgage. In *Dillman v. Nadlehoffer*, 119 Ill. 567 (7 N. E. 88), it was held that a false statement by the defendant that he had been offered \$25,000 for a certain patent furnished no ground for rescission of the contract induced by this statement. In *Noetling v. Wright*, 72 Ill. 390, the syllabus says:

"A purchaser cannot maintain an action against his vendor for false statements in regard to the value of the property purchased, or its good qualities, or the price he has been offered for it."

Like cases are these: *Hauk v. Brownell*, 120 Ill. 161 (11 N. E. 416); *Boles v. Merrill*, 173 Mass. 491 (53 N. E. 894, 73 Am. St. Rep. 308); *Holbrook v. Connor*, 60 Me. 578 (11 Am. Rep. 212); *Hemmer v. Cooper*, 8 Allen (Mass.), 334; *Page v. Parker*, 43 N. H. 363 (80 Am. Dec. 172); *Mackenzie v. Seeberger*, 76 Fed. 108 (22 C. C. A. 83); *Brown v. Castles*, 11 Cush. (Mass.) 348.

Even upon authorities holding that the simple representation falsely made of an offer for the property being sold will not vitiate the contract, many exceptions have been engrafted in the progress of time.

For instance, where the party making the representation has or affects to have superior knowledge as to the value of the property, while the other party is ignorant and relies upon the statement thus made, or where the property is at a distance so great that it is impracticable for the buyer to examine the same, the representation is held to be material, and its falsity will avoid the contract. On the theory that a statement of an offer is but the expression of some other man's opinion, this court has restricted the doctrine in *Olston v. Oregon Water Power & R. Co.*, 52 Or. 343 (96 Pac. 1095, 97 Pac. 538, 20 L. R. A. (N. S.) 915, note), where it is held that a statement of an opinion is necessarily based on a fact or carries with it such an inference that it can be interpreted as a statement of fact, and where it is known to be false and made with intent to deceive, it may be actionable.

On the other hand, there are many authorities indicating that the trend of judicial thought is toward the doctrine that, where a falsehood is uttered in a manner calculated to and which does swerve the judgment of a reasonably prudent man under all the circumstances, it will work the destruction of the contract or an award of damages in favor of the injured party. If, notwithstanding the deceit, he makes an independent investigation of the matter, and through that method forms his judgment and decision, he must abide by the resultant contract under the doctrine of *Wimer v. Smith*, 22 Or. 469 (30 Pac. 416), for thus it is made to appear that he did not rely upon the cozenage of the other party. The case of *Strickland v. Graybill*, 97 Va. 602 (34 S. E. 475), directly holds the doctrine that a false representation about the offer of another directly affects the value of the property in question. So do *Ives v. Carter*, 24 Conn. 392, and

Seamen v. Becar, 15 Misc. Rep. 616 (38 N. Y. Supp. 69). Cases like *Prescott v. Brown*, 30 Okl. 428 (120 Pac. 991), *Stauffer v. Hulwick*, 176 Ind. 410 (96 N. E. 154, Ann. Cas. 1914A, 951), *Kehl v. Abram*, 210 Ill. 218 (71 N. E. 347, 102 Am. St. Rep. 158), *Fottler v. Moseley*, 179 Mass. 295 (60 N. E. 788), and *Chisum v. Huggins* (Okl.), 154 Pac. 1146, are all complicated more or less with fiduciary relations existing between the parties or ignorance of the defrauded party who relies upon the superior knowledge of the other, or where opportunity to examine the property has been denied to the one who suffers from the fraud. A valuable case with an exhaustive note appended is *Kohl v. Taylor*, 35 L. R. A. (N. S.) 174, reported also in 62 Wash. 678 (114 Pac. 874).

3. We think the better argument may be thus stated: The ground for saying that an opinion as to value is negligible is that it is impossible to prove the falsity of a mere matter of judgment about which honest men may reasonably differ. But even this rule has been restricted as above stated. The reason, however, fails when a statement is made of a fact the truth of which may be demonstrated or disproved. In the present instance the third party either made the offer or he did not make it. That fact is capable of proof or refutation. There can be no honest difference of opinion about whether or not he made the offer. Again, the statement of the fact of the offer at the increased price was made for the purpose of inducing the defendant to agree to the higher price. It was intended to operate in that direction, and whether or not it did have that effect is for the jury to determine.

4. If demonstrable falsehood has been used to induce the execution of a contract in a manner calculated in the judgment of a jury to influence the deci-

sion of a reasonably prudent man under all the circumstances, it is sufficient to defeat the agreement at the election of the injured party. Under such conditions the court will not busy itself to determine how much untruth may be injected into a transaction without spoiling it. It is wrong to lie, and a person who has thus set a trap for the other party cannot be heard to complain that the latter should not have walked into the snare. It better comports with common honesty to condemn falsehood as a means of constructing a contract. There was no error in overruling the demurrer to the answer on that ground.

5. It remains for us to consider to what extent the recoupment urged by the defendant shall be allowed to prevail in this action. This is not an action to rescind the contract. On the contrary, the defendant proceeds in affirmance of the agreement, does not allege a return of the property which he received under the lease, but as originally framed demands an affirmative judgment for damages in excess of what remained due on the rent. The amendment whereby he waives such a judgment and uses his claim for damages as a mere defense does not alter the case. Recoupment, as defined by Mr. Justice MOORE in *Krausse v. Greenfield*, 61 Or. 502, 507 (123 Pac. 392, 394, Ann. Cas. 1914B, 115), is the keeping back or stopping something which is due. He says:

“Under the principles of the common law, ‘recoupment’ could be invoked when the defendant sustained damages by reason of the plaintiff’s nonperformance of his part of the contract sued on, in which case the damages to which the defendant was entitled could be abated from the plaintiff’s claim.”

The question then is: By what rule shall it be determined how much the defendant is entitled to hold back

from the amount due on the rent, conceding, as we must under the verdict, that he was imposed upon by the fraud of plaintiff's agent? The plaintiff requested and the court refused the following instructions to the jury:

"If you believe from the evidence that the rental under this lease was a reasonable rental at the time the lease was entered into, taking into consideration the rents then prevailing, you must allow defendant nothing on his counterclaim. If you find for defendant on his counterclaim, you should determine how much less valuable this lease was to defendant than if Phil Gevurtz had made the offer of \$10 per room as represented, and allow such amount to defendant as his damages. In assessing damages, if any are assessed, you are not to take into consideration any decrease in the rental value of the property which has occurred since April 11, 1910, the date of this lease, for plaintiff could not be charged with any loss accruing to defendant by a decline in the rental value."

It appears from the record that the plaintiff offered to prove what was the reasonable rental value of the building at the time the defendant took the lease, but this offer was denied, over the plaintiff's exception. The theory adopted by the court is embodied substantially in this instruction to the jury:

"There can be no middle ground in this case on the question of the amount of damages defendant has sustained, if any. If you find the issues in favor of the defendant, then your duty would be to ascertain the amount of credit he was entitled to. In doing this you must find from the evidence one of two possible facts: Either that defendant could and would have secured said lease at a rental of \$575 per month but for said alleged false representation, or, on the other hand, that he could and would not. If you find the fact to be that defendant would have secured said lease at the monthly rental of \$575 per month but for said rep-

resentation, defendant has been damaged to the extent of \$135 per month for five years, and your verdict should in such case be for defendant; but if you fail to so find, then plaintiff is entitled to a verdict for the sum of \$6,515.05.”

The sum of \$575 alluded to in this instruction was what the defendant claims was orally agreed upon as the rental of the building per month prior to the execution of the written lease.

6. As a standard for the measurement of damages the oral negotiations of the parties must be laid out of the case because of the provisions of Section 808, L. O. L. It is there stated:

“In the following cases the agreement is void unless the same or some note or memorandum thereof, expressing the consideration, be in writing and subscribed by the party to be charged, or by his lawfully authorized agent; evidence, therefore, of the agreement shall not be received other than the writing, or secondary evidence of its contents, in the cases prescribed by law. * * 6. An agreement for the leasing, for a longer period than one year, or for the sale of real property, or of any interest therein. * * ”

This enactment, more stringent in its terms than most statutes of fraud in other states, not only says that an oral agreement is void, but goes further, and interdicts any evidence of such a convention. For the purposes of this case, therefore, the oral testimony about what was offered for the lease on the one hand and accepted on the other is utterly of no value whatever.

7. It is stated by Mr. Justice BEAN, in *Robertson v. Frey*, 72 Or. 599, 604 (144 Pac. 128, 130):

“The general rule of damages in cases of fraud is that the party defrauded is entitled to recover the amount of loss caused by the fraud of the other party,

or damages adequate to the injury which he has sustained. The recovery must be limited to the actual loss: 20 Cyc. 130. There are a great number of cases in which the rule is stated that the measure of damages is the difference between the value of the thing purchased and the price paid, or in case of exchange the difference between the value of that with which the injured party was fraudulently induced to part and what he received."

In *Smith v. Bolles*, 132 U. S. 125 (33 L. Ed. 279, 10 Sup. Ct. Rep. 39), there was before the court a case wherein the plaintiff sought to recover damages which he had suffered by reason of the purchase of stock in a corporation induced by false and fraudulent representations made to him by the defendant. Mr. Chief Justice FULLER said:

"If the jury believed from the evidence that the defendant was guilty of the fraudulent and false representations alleged, and that the purchase of stock had been made in reliance thereon, then the defendant was liable to respond in such damages as naturally and proximately resulted from the fraud. He was bound to make good the loss sustained, such as the moneys the plaintiff had paid out and interest, and any other outlay legitimately attributable to defendant's fraudulent conduct; but this liability did not include the expected fruits of an unrealized speculation. The reasonable market value, if the property had been as represented, afforded, therefore, no proper element of recovery. Nor had the contract price the bearing given to it by the court. What the plaintiff paid for the stock was properly put in evidence, not as the basis of the application of the rule in relation to the difference between the contract price and the market or actual value, but as establishing the loss he had sustained in that particular. If the stock had a value in fact, that would necessarily be applied in reduction of the damages."

The matter may be likened to a statement of account between the parties wherein the defendant's gross damages may be set down as the amount of rent which he agreed to pay. With this he must be credited. In reduction of this he must be charged with the reasonable value of that which he received. If the value of what he has received is less than or equal to the amount of gross damages, the verdict should be for the defendant under the present form of the pleading; but, if the value of what he received is greater than his gross damage, the verdict should be for the plaintiff in the amount of the difference. The written lease, affirmed as it is by the defendant, is the contract by which the parties must be bound, subject to abatement in damages by reason of fraud alleged to have been practiced on the defendant. To refer to the oral convention said to have been had between the parties as a standard for fixed damages would be to make a new contract for them and to install as a rule governing their conduct what the statute says is utterly void and beyond the pale of testimony. The defendant may have been outwitted in the contest over the price to be paid; but it does not follow that because the plaintiff was at fault, we must violate the statute of frauds and establish a contract which the parties did not make and which the law says is null and of no effect. In correcting the balance of the scale disturbed by the fraud of the plaintiff, we must not go as far the other way beyond the reasonable value of the property which he received. The question about the abatement of the rental value must therefore be decided by what is the difference between what the defendant agreed to pay and the reasonable value of what he received as of the date the contract was made. He took his chances about fluctuation in the market

value of rents, and a subsequent decline cannot affect the case. If, indeed, the rent was reasonably worth the stipulated price, or if he has himself recouped his loss, he has no cause of complaint, for damages can be awarded only to one who has been really injured.

For these reasons, the judgment is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

MR. CHIEF JUSTICE MOORE, MR. JUSTICE BEAN and MR. JUSTICE HARRIS CONCUR.

Argued October 30, modified November 21, 1916.

PARKER v. HOOD RIVER.*

(160 Pac. 1158.)

Statutes—Charter—Effect of Partial Invalidity.

1. A provision in a city charter for personal liability on an assessment for municipal improvements, if invalid, does not vitiate the charter in other respects.

[As to effect of partial invalidity of statute, see note in Ann. Cas. 1916D, 9.]

Estoppel—Municipal Corporations—Public Improvements—Assessments.

2. A city is not estopped by unauthorized false statements of the city recorder as to the probable cost of an improvement from enforcing the assessment for the improvement.

Municipal Corporations—Public Improvements—Assessments—Irregularities—"Waiver."

3. An express waiver, in a bond given under Section 3245 et seq., L. O. L., on application to pay an assessment for a municipal improvement under the terms of that act, of irregularities or defects in the proceedings for the improvement, does not affect a supplemental assessment therefor levied long after, of which the party could have no knowledge, since a "waiver" exists only when one, with full knowledge of material fact, does or forbears to do some-

*Authorities discussing the question of source of power to create a liability for local assessment for public improvements are gathered in a note in 35 L. R. A. 58.

thing inconsistent with the existence of the right or of his intention to rely on that right.

Municipal Corporations — Public Improvements — Assessments — Validity.

4. An assessment of \$485.44 for a street improvement, the estimated cost of which was \$255, being an excess of more than 90 per cent over the estimate, is so unreasonable as to invalidate it.

From Hood River: WILLIAM L. BRADSHAW, Judge.

In Banc. Statement by MR. JUSTICE BENSON.

This is a suit by F. E. Parker against the City of Hood River, a municipal corporation, E. H. Hartwig, as mayor of the City of Hood River, and H. B. Langille, as recorder of the City of Hood River, and Robert Lewis, as marshal of the City of Hood River, to enjoin a sale of plaintiff's property in the City of Hood River in payment of certain special assessments against the same for the improvement of State Street, upon which such property fronts. From a decree dismissing the suit, plaintiff appeals. **MODIFIED.**

For appellant there was a brief and an oral argument by *Mr. S. W. Stark*.

For respondent there was a brief and an oral argument by *Mr. George R. Wilbur*.

MR. JUSTICE BENSON delivered the opinion of the court.

The history of this case as developed in the record is about as follows: Early in 1910 the common council of the City of Hood River determined to improve State Street from the west line of Sixth Street to the east line of East Second Street, and called upon the city engineer for an estimate of the probable cost. This having been supplied, the city notified plaintiff of the proposed improvement, that the estimated cost

as to his property was \$255, and notified him to apply for a permit, under the provisions of an ordinance, in the event that he wished to do the work himself. Plaintiff did not take any steps to do the work himself, so a contract was let for the improvement by the city, and on September 19, 1910, an ordinance was approved which declared the cost of the work and assessed the property of the plaintiff therefor in the sum of \$292. Thereafter, on October 6, 1916, plaintiff and his wife made written application to pay such assessment under the terms and conditions of the "Bancroft Bonding Act" (Section 3245 et seq., L. O. L.), in which application, conforming to the terms of the statute, occurs the following:

"We, Frank E. Parker and Pearl J. Parker, hereby expressly waive all or any irregularity or defect, jurisdictional or otherwise, in the proceedings to improve said street, or lay said sewer, and in the apportionment and assessment of the cost thereof on the property affected thereby. * * "

On May 11, 1911, the city recorder notified plaintiff of a supplemental assessment in the sum of \$193.44, making the total assessments upon plaintiff's property the sum of \$485.44. The property upon which this burden rests is a residence lot with a frontage of 47½ feet on State Street.

1. Plaintiff insists that these assessments are invalid by reason of the fact that the charter of the city contains the following clause:

"And from the time of the entry therein of an assessment against any property the sum so entered is to be deemed a tax levied and a lien against said property, and all other property within the City of Hood River then or thereafter owned by such person."

It is argued that this clause, in effect making the assessment a personal liability, is unconstitutional.

The validity of such a provision has never been passed upon by this court; the only reference thereto which we have found being in the case of *Ivanhoe v. Enterprise*, 29 Or. 245 (45 Pac. 771, 35 L. R. A. 58), wherein Mr. Chief Justice BEAN says:

“It is extremely doubtful whether a statute creating or authorizing a personal liability against a land owner for local improvements can be upheld on constitutional grounds.”

It was not necessary to a decision of the case then pending, nor is it material in the case at bar; for, even if such a provision violates the Constitution in any particular, it would only vitiate the charter to that extent and no further: *State v. Wiley*, 4 Or. 184; *Fleischner v. Chadwick*, 5 Or. 152.

2. In this case there is no attempt shown to subject any property to the burden of the lien other than that abutting upon the improvements. Plaintiff urges that he was misled by false representations of the city's agent as to the probable cost of the improvement, but the evidence discloses this to have been some loose statements in a conversation by the city recorder, and our attention has not been called to any authorities which would make the city responsible for unauthorized statements of an officer outside the scope of his authority, and these allegations can have no effect in our consideration of the case. We conclude that, so far as the first assessment is concerned, the plaintiff is estopped to complain of any irregularities in connection therewith by reason of his express waiver in the application to pay the same under the provisions of the bonding act.

3. The waiver, however, does not effect the supplemental assessment levied long after, for “a waiver exists only when one with full knowledge of a material

fact does or forbears to do something inconsistent with the existence of the right or of his intention to rely upon that right": 40 Cyc. 259. In this case the plaintiff could not know that there would be another and additional assessment, and therefore did not waive his right to contest the validity thereof.

4. Plaintiff contends very strenuously that the assessments are so greatly in excess of the estimates that he was misled thereby to his injury, and, as to the supplemental assessment, we think there is merit in his contention. It will be recalled that the estimated burden upon plaintiff's property was \$255. If the last assessment be upheld, the actual cost will be more than 90 per cent in excess of such estimate. We think this is so excessive a variance as to be unreasonable in the light of the doctrine set forth in *Miller v. Portland*, 78 Or. 165 (151 Pac. 728). The views herein expressed render a discussion of the other questions involved unnecessary.

The decree will be modified to the extent of enjoining the city from enforcing any lien as to the second assessment of \$193.44; neither party to recover costs in either court.

MODIFIED.

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ABATEMENT AND REVIVAL.

Abatement and Revival—Death—Statute.

1. Section 38, L. O. L., made applicable to suits in equity by Section 395, providing that no action shall abate by the death of the party if the cause of action survive or continue, and that in case of the party's death the court may allow the action to be continued against his successor in interest, contemplates the existence and pendency of an action at the time of the death, and did not apply where the party named therein as sole defendant had died several months before the filing of the complaint, as there was then no defendant at all and no action to abate or continue. (Robinson v. Scott, 20.)

Abatement and Revival—Death—Judgment.

2. Where the party named by the complaint as sole defendant died before the filing of the complaint, a judgment against such party would have been a nullity, and the complaint upon which the judgment was based would be as much of a nullity as the judgment itself. (Robinson v. Scott, 20.)

Abatement and Revival—Dissolution—Actions.

3. Where corporation's cause of action accrued one year prior to voluntary dissolution of the corporation, but action was not brought for two years after such dissolution, and the cause was pending in a lower court after reversal of judgment on appeal, at the end of the five-year period allowed by Section 6699, L. O. L., to dissolved corporations for defending or prosecuting actions, the right to continue the prosecution in the name of the corporation ceased, and the corporation was absolutely defunct beyond the five-year limit, so that the action should abate. (Service Lum. Co. v. Sumpter Valley Ry. Co., 32.)

Abatement and Revival—Prosecution—Commencement—"Prosecute."

4. To "prosecute" an action is not merely to commence it, but includes following it to an ultimate conclusion, so that under Section 6699, L. O. L., commencement of an action by a dissolved corporation before the expiration of the five-year limit does not extend the limit until final determination of the cause. (Service Lum. Co. v. Sumpter Valley Ry. Co., 32.)

ACCRETION.

See Navigable Waters, 3.

ACKNOWLEDGMENT.

Acknowledgment—Sufficiency of Certificate of Acknowledgment.

1. In considering the sufficiency of the certificate of acknowledgment of a mortgage, the whole instrument should be examined. (Coates v. Smith, 556.)

Acknowledgment—Certificate—Names of Mortgagors—Clerical Error—Statute.

2. Under Section 7109, L. O. L., relative to certificates of acknowledgment of mortgages, where the certificates of acknowledgment of a mortgage identified the parties as known to the officer taking the acknowledgment to be the persons executing the instrument, the fact that the names appeared spelled as "Samuel H. Smith" and "Adora L. Smith," instead of the names of the mortgagors, Chester A. Smith and Otis S. Smith, will not vitiate the instrument, the presumption being that the variance in names was the result of a mere clerical error, as the material matter is the identification of the mortgagors, and not the notation of their names. (Coates v. Smith, 556.)

Acknowledgment—Certificate—Sufficiency.

3. The language of a certificate of acknowledgment of a mortgage will be liberally construed, and, when it refers to the conveyance, reference may be had to the body of the deed or mortgage in aid of the certificate, which is sufficient if the two together show a substantial compliance with the statute. (Coates v. Smith, 556.)

Acknowledgment—Duty of Officer Taking—Presumption—Statute.

4. There is a presumption that the officer taking an acknowledgment of a deed or mortgage complied with Section 7109, L. O. L., requiring that he know or have satisfactory evidence that the person making the acknowledgment is the individual described in and who executed the conveyance. (Coates v. Smith, 556.)

Acknowledgment—Mortgages—Form.

5. No particular form is required for an individual acknowledgment of a mortgage. (Coates v. Smith, 556.)

ACQUIESCENCE.

See Estoppel, 3.

ACTION.

Action—Persons Liable—Defendant.

1. The very existence of a cause of suit implies that there is some competent person to be sued, and for that reason a suit cannot be maintained if a defendant is lacking. (Robinson v. Scott, 20.)

Action—Nature and Form.

2. Where a complaint alleges the conversion of personalty, the breach of an agreement as to the manner in which business should be conducted, and misrepresentations as to the ownership of property involved all resulting in the destruction of plaintiff's business, the action is not in the nature of trover, but of action on the case. (Cash v. Garrison, 135.)

See Abatement and Revival, 3.

See Bankruptcy, 1.

See Bills and Notes, 1.

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Amendment of Verification is Discretionary.

See Appeal and Error, 21.

APPEAL AND ERROR.

Appeal and Error—Question of Fact—Review.

1. The verdict of the jury on conflicting evidence forecloses any inquiry into the credibility of the witnesses or the weight of their testimony. (Childers v. Brown, 1.)

Appeal and Error—Grounds for Dismissing Appeal.

2. Where the defendant, after perfecting an appeal, satisfies the judgment, his appeal on motion of plaintiff should be dismissed. (Baker v. Stacy, 10.)

Appeal and Error—Former Decision—Matters Concluded.

3. A judgment on defendant's appeal from a judgment for plaintiff corporation rendered within five years allowed to a corporation after its dissolution for the purpose of bringing suits, etc., appealed on the ground of error in refusing an instruction that if plaintiff had been dissolved before commencing the action it could not maintain it, and reversing and remanding for a new trial after the lapse of such five-year period, was not conclusive on defendant's second appeal on the ground that the action was abated because the five-year period had expired at the time of the second trial. (Service Lum. Co. v. Sumpter Valley Ry. Co., 32.)

Appeal and Error—Parties—Death—Substitution—Time.

4. Where motion is made to substitute parties plaintiff, the original plaintiff corporation being defunct, it is not necessary that such motion be made within one year, as required by Section 38, L. O. L., if the appeal has been taken before the disability arises. (Service Lum. Co. v. Sumpter Valley Ry. Co., 32.)

Appeal and Error—Review—Verdict.

5. In an action for the conversion of a carload of lumber which the plaintiff alleged to be his property under sale from a party against whom the defendant corporation had brought action and

attachment, evidence *held* to support a verdict for the defendant, within the rule that where there is any evidence to support the verdict the court, under Article VII, Section 3, of the Constitution, is precluded from disturbing it. (Clarke v. Ward & Obenchain, 70.)

Appeal and Error—Review—Findings of Fact.

6. Upon an appeal from a cause tried to the court without a jury the evidence will be reviewed only to ascertain if it is competent to support the findings, which will be sustained unless the evidence is insufficient as a matter of law to support them. (Weiger v. Steen, 72.)

Appeal and Error—Filing Brief—Timeliness.

7. Where the Supreme Court extended the time for filing appellant's brief to and including February 12th, on which date appellant filed its brief, showing service of a copy on February 11th, the brief was filed in time. (White v. East Side Mill Co., 107.)

Appeal and Error—Scope of Review—"Error Committed During the Trial."

8. Plaintiff's denial that her decedent carelessly stepped in front of a truck, or negligently failed to look out for his own safety, presenting a deficiency of pleading, is not an "error committed during the trial," within the provisions of Article VII, Section 3, of the Constitution, requiring affirmance in spite of such errors. (White v. East Side Mill Co., 107.)

Appeal and Error—Scope of Review—Constitutional Provisions.

9. Article VII, Section 3, of the Constitution, requiring affirmance, notwithstanding errors committed during the trial, if the judgment was such as should have been rendered, is not intended to authorize courts to disregard statutes requiring sufficient pleadings or other preliminaries to trial. (White v. East Side Mill Co., 107.)

Appeal and Error—Disposition of Cause—Affirmance.

10. Under Article VII, Section 3, of the Constitution, as amended, authorizing the Supreme Court to affirm the judgment when it can be determined that it was such as should have been rendered, the judgment in an action for conversion of property and injury to plaintiff's business will be affirmed, notwithstanding technical errors, where the Supreme Court determines that the verdict was such as should have been rendered. (Cash v. Garrison, 135.)

Appeal and Error—Appeal from Order Granting New Trial—Certification of Testimony.

11. Upon appeal from an order granting new trial, the Supreme Court must have the record of the former hearing before it to determine whether or not there was any error therein which would justify the order vacating the judgment, and under Article VII, Section 3 of the Constitution, appellant has the right to have the whole testimony attached to the bill of exceptions. (Portland Gas & Coke Co. v. Campbell, 154.)

Appeal and Error—Failure to Take Cross-appeal—Effect.

12. Where plaintiff did not take a cross-appeal from the part of the decree sanctioning the building and maintenance of the defendant's

spillway on his land, it will be assumed that he was satisfied with such final determination. (Mathews v. Chambers Power Co., 251.)

Appeal and Error—Review—Findings.

13. On appeal from a judgment at law, tried without a jury, the Supreme Court must determine whether there was any competent evidence to support the findings. (Armstrong v. Pincus, 156.)

Appeal and Error—Restraining Order—Vacation.

14. In a suit for accounting for commission for the sale of real estate, earned by plaintiff and defendants, and received by defendants, where the trial court granted a restraining order against the transfer of corporate stock received by defendants as a part of the commission, which order was dissolved on the rendition of a decree for defendants, and on appeal a justice of the Supreme Court reinstated the order, such order will not be vacated before final hearing, though plaintiff's right to relief on the merits be doubtful, where the continuance of the order will not cause defendants any great inconvenience, and plaintiff has given an undertaking to pay damages sustained by defendants by reason of the injunction, if it be wrongful, or without sufficient cause. (Coopey v. Keady, 218.)

Appeal and Error—Remand—Leave to Apply for Further Relief.

15. In a suit to foreclose a purchase money mortgage in which the mortgagor set up the equitable defense of the mortgagee's encumbrance created by a conveyance of the timber with the right to remove it, but where, in view of the grantee's failure to cut and remove any timber, the mortgagor's damage was but small, and it reverted within six months, the cause will be remanded and continued to the expiration of the time for removal, so that damages might then be ascertained. (Kreinbring v. Mathews, 243.)

Appeal and Error—Review—Harmless Error.

16. In an action on promissory notes, the failure of defendant to properly plead a counterclaim for the value of a horse leased to plaintiff and which died through want of proper care, *held* not to require reversal under Article VII, Section 3 of the Constitution, of judgment allowing such counterclaim. (Meadow Valley Land Co. v. Manerud, 303.)

Appeal and Error—Necessary Parties—How Determined.

17. Whether one is a necessary party to an appeal depends not on whether he is adverse to the appealing party, but whether he will be injuriously affected by modification or reversal. (D'Arcy v. Sanford, 323.)

Appeal and Error—Necessary Parties—Notice—"Adverse Party."

18. Where the maker of a note secured judgment against the assignee and the maker's former partner, decreeing the note paid and canceled for fraud of such partner in securing it and failing to pay it as agreed, the partner was a necessary and "adverse party," and notice of appeal, to him, was required under Section 550, L. O. L., as amended by Laws of 1913, page 617, as to notice of appeal. (D'Arcy v. Sanford, 323.)

Appeal and Error—Law of Case—Motion for Directed Verdict.

19. Where the evidence contained in the record on a second appeal is not materially different from that produced on the first trial, the decision on the first appeal, on motion for directed verdict, that the plaintiff was entitled to have the jury pass on the evidence, is the law of the case on the second appeal. (Wicks v. Sanborn, 366.)

Appeal and Error—Review—Findings of Fact by Trial Court—Conclusiveness.

20. The findings of fact by the trial court on conflicting oral testimony, while not conclusive on appeal, are entitled to great weight. (Baldwin Co. v. Savage, 379.)

Appeal and Error—Discretion of Trial Court—Amendment—Verification.

21. The action of a trial court in permitting or refusing an amendment of verification is discretionary, and not reviewable on appeal. (Clark v. Clark, 405.)

Appeal and Error—Right to Complain—Instructions.

22. Plaintiff having joined the employer and the owner of the premises upon which he was injured while engaged in repair work, and alleged negligence on the part of each concurring in the resulting injury, neither defendant could complain of an instruction more favorable to its codefendant than to itself. (Gunnell v. Van Emon Elevator Co., 408.)

Appeal and Error—Record—Review.

23. On an appeal presented upon a record embracing only the pleadings and the findings of the trial court, the only question involved is whether the judgment appealed from is supported by the facts ascertained by the court and the admissions found in the pleadings. (Neilson v. Title Guaranty & Surety Co., 422.)

Appeal and Error—Notice of Appeal—"Adverse Party."

24. An "adverse party," with reference to the right to service of a notice of appeal, is a plaintiff or defendant in an action or suit whose interest in regard to the judgment or decree appealed from is in conflict with a reversal or modification of the final determination sought to be reviewed, and includes one whose discharge in bankruptcy would be thereby affected. (Van Zandt v. Parson, 453.)

Appeal and Error—Harmless Error—Instructions.

25. In an action for personal injuries by the employee of a stevedore company, the instruction that a servant in entering employment assumes the ordinary risks incident to the work contracted to be done, or such as the master might have avoided by reasonable care, though erroneous, was not prejudicial to the master. (Nelson v. Brown & McCabe, 472.)

Appeal and Error—Reversal for Colloquy of Counsel.

26. In a servant's action for injuries, where, during argument, one of plaintiff's attorneys stated that plaintiff had a wife and family to support, which should be taken into consideration in assessing damages, whereupon defendant's attorney objected and took an ex-

ception to the remark, whereupon opposing counsel reiterated the statement, defendant's attorney again objecting and taking an exception, there was no reversible error, where the court was not called upon to rule upon the question or to instruct the jury to disregard the argument of plaintiff's counsel. (*Nelson v. Brown & McCabe*, 472.)

Appeal and Error—Disposition—Following Mandate of Supreme Court.

27. Where the mandate of the Supreme Court directs specifically what judgment shall be entered by the lower court, the latter's duty is to follow the direction implicitly; it being, in effect, the judgment of the Supreme Court, which the lower court, after entering, has no authority to set aside, or to grant new trial. (*Bertin & Lepori v. Mattison*, 482.)

Appeal and Error—Judgment on Remand.

28. An appeal does not lie from a judgment entered by the lower court pursuant to the mandate of the Supreme Court, in the absence of suggestion that the judgment and mandate are broader than essential. (*Bertin & Lepori v. Mattison*, 482.)

Appeal and Error—Review—Harmless Error—Admission of Evidence—Facts Admitted.

29. Although the trial court might have considered an oral statement of counsel as a waiver of the state's claim to the personalty, as the state did not in unequivocal terms admit the fact to be that the County Court had ordered a distribution of the personal property to persons whom that court had found were the heirs of the deceased, and since proof of the fact would establish the claims of the defendant and defeat the claim of the state, the admission of evidence of the order made by the County Court was not prejudicial error. (*State v. Finnigan*, 538.)

Appeal and Error—Reversal—Constitutional Provision.

30. Where the jury made no mistake in returning a verdict for the school district in a teacher's action for a balance due under a teaching contract, the judgment will be affirmed as required by Article VII, Section 3 of the Constitution, as amended, notwithstanding any errors that may have been committed during the trial. (*Foreman v. School Dist. No. 25*, 587.)

Appeal and Error—Decisions Reviewable—Order Reinstating Cause.

31. An order reinstating an action dismissed without prejudice, because the statute of limitations would bar the institution of another action for the same cause, is not final, and an appeal therefrom will be dismissed. (*Kyla-Kierola v. Stanley-Smith Lumber Co.*, 640.)

Appeal and Error—Reservation of Grounds of Review—Exceptions to Rulings.

32. There can be no reversal where, throughout the testimony, no exception was taken to any ruling of the court, since only for error legally excepted to, will a decision of the Circuit Court be reversed. (*Douglas Creditors' Assn. v. Hutchason*, 644.)

Appeal and Error—Harmless Error—Overruling Demurrer.

33. In an action for rent, where defendant's answer remedied the defective averment of the complaint in respect to lack of proper description of the land, the action of the court in overruling demurrer to the complaint was harmless. (Treadgold v. Willard, 658.)

Appeal and Error—Injunction—Violation Pending Appeal—Prosecution for Contempt.

34. Where a corporation was enjoined from intermeddling with wharf property, the taking of an appeal from the decree, and the giving of supersedeas bond did not render it immune, while the appeal was pending, from prosecution for contempt for a violation of the injunction. (Treadgold v. Willard, 658.)

Appeal and Error—Record—Time for Filing—Evidence.

35. Where an appeal was perfected in accordance with Section 550, subdivision 4, L. O. L., on April 19th, the trial court had no authority, under Section 554, requiring the transcript to be filed within 30 days after the appeal is perfected, to enter an order on May 27th extending the time to file the transcript. (Bell v. Fleming, 682.)

Appeal and Error—Proceedings to Transfer Cause—Notice of Appeal—Persons Entitled—"Adverse Party."

36. Under Section 550, L. O. L., requiring notice of appeal to be served on such adverse party or parties as have appeared, an appeal by a defendant from a decree enjoining enforcement of the judgment will be dismissed where a codefendant of the appellant who would be compelled to pay the judgment in case of reversal of the decree appealed from is not served with process; an "adverse party," within Section 550, being one whose interest in relation to the judgment or decree is in conflict with the modification or reversal sought by the appeal. (French v. McKean, 683.)

See Costs, 3.

See Criminal Law, 4-6, 12-14, 17.

APPEARANCE.**Appearance—Special Appearance.**

1. Under Section 542, L. O. L., providing that a defendant appears when he answers, demurs or gives written notice of appearance, and Section 63, making a voluntary appearance equivalent to personal service, an oral question of counsel as to the allowance of costs, where his motion on special appearance to dismiss an attachment has been granted, is not a general appearance. (Spores v. Maude, 11.)

ARSON.

See Criminal Law, 11.

ASSESSMENT.

See Estoppel, 4.

See Municipal Corporations, 5-7, 9, 11, 13, 16, 20-23.

See Quieting Title, 1.

See Taxation, 1-3.

ASSUMPTION OF DEBT.

See Mortgages, 2.

ASSUMPTION OF RISK.

See Master and Servant, 4.

ATTACHMENT.**Attachment—Statute—Strict Compliance.**

1. Under Section 295, L. O. L., providing for attachment upon an unsecured contract for the direct payment of money or upon contract where defendant is a nonresident, the attachment was an ancillary provisional remedy and the statute must be strictly followed or no right is thereby acquired. (Spores v. Maude, 11.)

Attachment—In Equitable Action.

2. In a suit in equity, jurisdiction is not acquired by the attachment of property of a nonresident defendant, so as to authorize the court, upon service of summons by publication, to order the condemnation and sale of the land to satisfy the judgment. (Spores v. Maude, 11.)

ATTORNEY AND CLIENT.**Attorney and Client—Conduct—Presentation of the Case.**

1. It is the attorney's duty, without flattery or scurrility, to present his view of the law, irrespective of an adverse ruling of the court. (Phipps v. Medford, 119.)

Attorney and Client—Attorney's Lien—Notice—Statute.

2. The right to an attorney's lien depends upon notice of a lien upon the judgment being served upon the judgment debtor and filed, under Section 1088, L. O. L. (Townsend v. Chamberlain, 163.)

Attorney and Client—Assertion of Lien—Order of Court.

3. Where defendant judgment creditor's attorney made a motion, supported by affidavits, asserting his claim of attorney's lien and that the settlement of the judgment by his client, the judgment creditor, was in fraud of his rights, the proceeding on the motion not being part of the suit to set aside the judgment as fraudulent, plaintiffs, the judgment debtors, not being served with notice and not appearing, while the parties in interest were different from those in the action in which the judgment was rendered, the order of the court canceling the satisfaction, the affidavits, stating no fact indicating that it was obtained fraudulently, or that the settlement was invalid as to the judgment debtors, and authorizing the collection of the remainder of the judgment by the attorney, was a nullity. (Townsend v. Chamberlain, 163.)

Attorney and Client—Attorney's Lien—Payment or Satisfaction of Judgment—Statute.

4. Under Section 1088, L. O. L., touching attorney's liens, where the judgment debtor in good faith pays or satisfies the judgment before notice of the lien of the judgment creditor's attorney, the latter

cannot enforce the judgment as against him. (Townsend v. Chamberlain, 163.)

Attorney and Client—Suspension—Deceit—Statute.

5. Under Section 1092, L. O. L., providing that an attorney may be removed or suspended for being guilty of any willful deceit or misconduct in his profession, where an attorney, handling claims for collection, after being notified by the debtor that it would pay in full on presentation of the bill, wrote his client to ascertain the least the claim would be compromised for, thus intimating that the matter was yet unsettled, and, after receiving two checks for the amount of the claim from the debtor, which he indorsed without authority and cashed, did not admit that he had collected the money until his client had direct communication with the debtor, such attorney will be suspended from membership of the bar for one year. (State ex rel. v. Farrin, 489.)

ATTORNEY FEES.

See Bills and Notes, 1.

AUDIT.

- Of County Books by Insurance Commissioner.

See Counties, 3, 5, 7,

AUTHORITY.

See Counties, 9, 10.

BANKRUPTCY.

Bankruptcy—Trustee—Action in State Court.

1. A trustee in bankruptcy may sue in the state court, and where he does so to recover fraudulently conveyed property or property otherwise recoverable, he is entitled to all remedies and all relief which would be afforded any other party litigant under the same facts. (Van Zandt v. Parson, 453.)

Bankruptcy—Right of Trustee—Bona Fide Purchaser.

2. A trustee in bankruptcy, having the right of an attaching creditor, is not *ipso facto* a *bona fide* purchaser for value, and that he is such a purchaser, unaffected by outstanding equities against the bankrupt, is an affirmative defense, which must be pleaded and proved. (Coates v. Smith, 556.)

BANKS AND BANKING.

Banks and Banking — Stockholders — Liability for Debts — Constitutional Provision.

1. The amendment to Article XI, Section 3, of the Constitution (Laws 1913, p. 8), adding thereto the provision that the stockholders of corporations and joint-stock companies conducting the business of banking shall be individually liable for the benefit of depositors to the amount of their stock at par, in addition to the par value of such shares, cannot be extended to include creditors of a bank for merchandise sold to it. (Norris Safe & Lock Co. v. Weaver, 670.)

Banks and Banking—Actions Against Stockholders—Pleading.

2. In an action to enforce, against alleged stockholders of a bank, payment of balance due on a judgment recovered by plaintiff against the bank, the complaint which did not show how many shares each defendant subscribed, and how much remained unpaid upon his subscription, so that the court might know the extent of the award to be made against him, did not state a cause of action. (Norris Safe & Lock Co. v. Weaver, 670.)

BILL OF EXCEPTIONS.

See Exceptions, Bill of.

BILLS AND NOTES.**Bills and Notes—Actions—Amount of Recovery—Attorneys' Fees.**

1. In an action on promissory notes, where, by the allowance of defendant's counterclaim, plaintiff had judgment for only \$48.77, the allowance of \$100 as attorneys' fees *held* unreasonable. (Meadow Valley Land Co. v. Manerud, 303.)

Bills and Notes—Mortgages—"Duress"—Threats of Imprisonment.

2. Evidence *held* sufficient to sustain a finding that notes and mortgages should be set aside as procured by "duress" and executed under threats that defendants' son would be sent to the penitentiary for embezzling money while agent of the mortgagee. (Baldwin Co. v. Savage, 379.)

Bills and Notes—Mortgages—Validity—Duress—Threats of Imprisonment.

3. Notes and mortgages, given by parents under the influence of threats that otherwise their son will be sent to the penitentiary for embezzlement of moneys of the mortgagee, are voidable for duress. (Baldwin Co. v. Savage, 379.)

BLANKET POLICY.

See Insurance, 1.

BOARD OF EQUALIZATION.**Duties are to Equalize Assessments.**

See Taxation, 2, 3.

BONA FIDE PURCHASER.

See Bankruptcy, 2.

See Fraudulent Conveyances, 6.

See Vendor and Purchaser, 1.

BOUNDARIES.**Boundaries—Surveys—Meander Lines.**

1. The stream or other body of water, and not the meander line as actually run on the ground to measure a fractional section abutting

on such stream, is the boundary line of the land. (*Armstrong v. Pincus*, 156.)

Boundaries—Determination—Decree—Title to Land.

2. In a suit ostensibly to establish a division line, but in fact to establish title to a strip of land near the boundary, the court had power to decree that the plaintiff had no title to the strip, and that the defendant was the owner thereof, rather than merely to dismiss the suit. (*Nolan v. Cook*, 287.)

Boundaries—Equity—Jurisdiction—Title to Land.

3. Equity has no jurisdiction to say which of two lines is meant by a description in a deed, for this would be determining the title to land. (*Nolan v. Cook*, 287.)

Boundaries—Purchase of Disputed Title—Suits Involving Title.

4. No one can snoop among the deed records, find and buy a lawsuit involving realty, and expect a court of equity to award him a title under guise of settling a disputed boundary. (*Nolan v. Cook*, 287.)

BREACH.

See Carriers, 1, 2.
See Covenants, 1-3.

CARRIERS.

Carriers—Contracts—Breach—Damages—Measure.

1. As a general rule, damages for breach of a carrier's contract to supply cars may be predicated with reference to all that was in the reasonable contemplation of the parties in performance of the agreement. (*Levy v. Nevada-California-Oregon Ry.*, 673.)

Carriers—Contracts—Breach—Damages—Measure of.

2. Under a contract to supply cars for shipment of livestock, which the carrier broke by delay in supplying cars, knowing that the stock was intended for sale on the market in a distant city, the measure of damages is not the amount of depreciation at the point of shipment, but the depreciation in market value at the destination; that being within the reasonable contemplation of the parties. (*Levy v. Nevada-California-Oregon Ry.*, 673.)

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CERTIFICATE.

See Vendor and Purchaser, 8.

Sufficiency of Certificate of Acknowledgment.

See Acknowledgment, 1-3.

CERTIORARI.**Certiorari—Scope of Writ—Questions of Law.**

1. A writ of review is an appropriate proceeding to present questions of law arising in relation to a disputed claim against the county after it has been presented and disallowed. (*Berridge v. Marion County*, 391.)

Certiorari—Scope of Review—Record—Evidence.

2. On re-examination on writ of review, the court will not consider evidence outside the record, unless it was submitted to the inferior tribunal prior to its decision. (*Berridge v. Marion County*, 391.)

Certiorari—Scope of Writ—Questions of Law.

3. The question of law whether the state insurance commissioner may contract for audit of county books without assurance that county will pay therefor, so as to render the county liable for the expense, in view of Laws of 1913, page 545, as to audits, may properly be raised by writ of review directed to the order of the County Court disallowing the claim. (*Berridge v. Marion County*, 391.)

See Counties, 8.

CHARTER OF CITIES.

Astoria—*Staples v. Astoria*, 99.

Clatsop—*Flavel Land Co. v. Leinenweber*, 353.

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Medford—*Phipps v. Medford*, 119.

Salem—*Moffitt v. Salem*, 686.

Springfield—*Klov Dahl v. Springfield*, 168.

Warrenton—*Flavel Land Co. v. Leinenweber*, 353.

CHOSSES IN ACTION.**Choses in Action—Common Law—Statutes.**

1. Choses in action exist only by virtue of the common law or statute; thus, a claim for the loss of the society or assistance of a husband cannot be enforced by either a wife or widow, unless created by statute. (*Kosciolek v. Portland Ry., L. & P. Co.*, 517.)

CITIES.

See Municipal Corporations.

CITY CHARTERS.

See Charter of Cities.

CITY ORDINANCES.

See Municipal Corporations.

CIVIL RIGHTS.**Civil Rights—Natural Rights—Husband and Wife.**

1. The natural rights of a person at common law are those of personal security in the legal enjoyment of life, limb, body, health and reputation, the right of personal liberty, and the right of private property, and do not include rights growing out of the marriage relation, as, for instance, consortium, since those are based on social customs. (*Kosciolek v. Portland Ry., L. & P. Co.*, 517.)

CLATSOP, CHARTER OF.

See *Flavel Land Co. v. Leinenweber*, 353.

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See *Quieting Title*, 1.

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COMMON LAW.

See *Choses in Action*, 1.

COMPENSATION.

See *Officers*, 2.

COMPROMISE AND SETTLEMENT.**Compromise and Settlement—Consideration—Invalid Claims.**

1. Where the mortgagee and the purchaser from the mortgagor believed that the mortgage contained a clause for the payment of taxes, and the former in good faith had started foreclosure proceedings because of the failure to pay taxes, a settlement of such proceedings is sufficient consideration for a promise made by the purchaser to insure the building for the mortgagee's benefit, though in fact the mortgage contained no clause for the payment of taxes, and there was no right to foreclose, and that promise will be enforced in equity. (*Butson v. Misz*, 607.)

CONSIDERATION.

See *Compromise and Settlement*, 1.

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CONCLUSIVENESS.

See Appeal and Error, 20.
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CONSTITUTIONAL LAW.**Constitutional Law—Scope of Judicial Review—Policy of Law.**

1. The court is not concerned with the policy of the initiative and referendum system, but must construe such laws and laws enacted thereunder as it finds them. (*Phipps v. Medford*, 119.)

Constitutional Law—Elections—Nominations—Free and Equal Elections—Privileges and Immunities.

2. Laws of 1915, page 124, providing for nominations for primary election by payment of fee, as a method additional to that of Laws of 1913, page 183, providing for nominations without fee on petition, is not invalid as violating Article II, Section 1, of the Constitution, requiring all elections to be free and equal, or Article I, Section 20, prohibiting privilege or immunity legislation, since no distinction is made on the ballot, and the candidate may elect the method he will follow. (*Patton v. Withycombe*, 210.)

Constitutional Law—Obligation of Contracts.

3. An amendment to Article XI, Section 3, of the Constitution, adding to it the provisions that the stockholders of corporations and joint-stock companies conducting the business of banking shall be individually liable for the benefit of depositors to the amount of their stock at par in addition to the par value of such shares, cannot impair the obligations of a subscription contract made before its adoption and while Section 3 limited the liability of stockholders to the amount of their stock subscribed and unpaid. (*Norris Safe & Lock Co. v. Weaver*, 670.)

See Appeal and Error, 9-11, 30.
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CONTEMPT.**Prosecution for Contempt Pending Appeal.**

See Appeal and Error, 34.

CONTRACTS.**Contracts—Construction—Intent.**

1. Under Section 716, L. O. L., in the construction of written agreements, the intention of the parties is to be pursued, if it can possibly be done. (Northwestern Transfer Co. v. Investment Co., 75.)

Contracts—Validity—Public Policy.

2. It is contrary to the general policy of the law to restrict the power of citizens to make any kind of contract which they may see fit to enter into, so long as the proposed contract does not affect the morals or well-being of society to such an extent as to be against public policy. (Patterson v. Chambers Power Co., 328.)

Contracts—Validity—Indefiniteness—Surrounding Circumstances.

3. A contract will not be held void for indefiniteness when, by considering it as a whole and taking into consideration the surrounding circumstances, the true intent of the parties can be ascertained. (Patterson v. Chambers Power Co., 328.)

Contracts—"Consideration."

4. "Consideration" is a benefit to the party promising, or a loss or detriment to the party to whom the promise is made. (Butson v. Misz, 607.)

See Carriers, 1, 2.

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See Logs and Logging, 1.

See Vendor and Purchaser, 7.

See Waters and Watercourses, 1-5, 8-10.

CORPORATIONS.**Corporations—Dissolution—Existence for Purpose of Bringing Suit—Statute.**

1. Under Section 6699, L. O. L., providing that after dissolution all corporations shall continue to exist as bodies corporate for five years if necessary to prosecute or defend suits, or settle their affairs, an action by a corporation which had taken the statutory steps for a voluntary dissolution, tried after the expiration of the five-year period, was abated. (Service Lum. Co. v. Sumpter Valley Ry. Co., 32.)

Corporations—Dissolution—Prosecution of Actions—Judgment After Expiration of Time Limit.

2. Where a judgment of reversal is rendered by Supreme Court in an action by a dissolved corporation, after the expiration of the five years allowed by Section 6699, L. O. L., for the prosecution of such actions, the judgment is void, and on a second appeal the hearing is upon the original appeal as if no judgment had been rendered. (Service Lum. Co. v. Sumpter Valley Ry. Co., 32.)

Corporations—Dissolution—Title to Corporate Property.

3. The stockholders of a defunct corporation, in the absence of creditors, are vested with title to the corporate property as tenants in common. (Service Lum. Co. v. Sumpter Valley Ry. Co., 32.)

Corporations—Parties—Stockholders of Defunct Corporation.

4. Under Section 27, L. O. L., requiring that every action be prosecuted in the name of the real party in interest, except as provided in Section 29, the stockholders of a defunct corporation having no creditors are proper parties plaintiff in an action to enforce a corporate claim. (Service Lum. Co. v. Sumpter Valley Ry. Co., 32.)

Corporations—Dissolution—Action—Parties—Substitution.

5. Stockholders of a defunct corporation may be substituted as parties plaintiff in an action where an appeal has been taken before dissolution of the corporation without the necessity of making motion for such substitution within one year after the dissolution of the corporation as required by Section 38, L. O. L. (Service Lum. Co. v. Sumpter Valley Ry. Co., 32.)

Corporations—Liability of Stockholders—Unpaid Subscriptions—Defenses—Fraud.

6. In a suit by a judgment creditor after execution returned *nulla bona*, to enforce the liability of the stockholders in an insolvent corporation upon their unpaid subscriptions to its capital stock, where the creditor did not know of alleged fraudulent representations to defendants to induce them to become stockholders, such fraudulent representations were no defense to the suit. (Morgan v. Ruble, 641.)

COSTS.**Costs—Nature of Remedy.**

1. Under Section 561, L. O. L., costs are certain sums of money prescribed by statute as indemnity on account of attorney fees in prosecuting or defending a suit or action. (Spores v. Maude, 11.)

Costs—In Equity—Discretionary.

2. Under Section 567, L. O. L., the allowance of costs in a suit in equity is a matter resting in the sound discretion of the court. (Spores v. Maude, 11.)

Costs—Appeal and Error—Failure to Raise Point Below.

3. In suit to reform a note and mortgage, where the specifications of a defendant's demurrer to the complaint did not direct the attention of the trial court to the point urged against it on such defendant's appeal, he could not recover costs, though successful. (Coates v. Smith, 556.)

COUNTERCLAIM.

See Bills and Notes, 1.

See Dismissal and Nonsuit, 2.

See Setoff and Counterclaim.

COUNTIES.**Counties—Taxation—Disposition of General Taxes—Statute.**

1. Under Sections 937, 6278, L. O. L., giving County Courts authority over county roads and power to tax for general county purposes, the moneys so raised may be used upon county roads, for Sections 6320, 6321, authorizing special tax levies for "building and improving" county roads is not an exclusive, but merely a supplementary, method of raising road funds. (Roney v. Lane County, 372.)

Counties—Taxation—Disposition of General Taxes—Statute.

2. Budget Law (Laws 1913, p. 458), requiring the County Court to publish an estimate of the amount required for each department of the county government, merely requires an estimate of how much of the general tax fund, as distinguished from the special road tax fund, will be used for road purposes. (Roney v. Lane County, 372.)

Counties—Audit of Books—Powers of Insurance Commissioner—Time of Audit.

3. Under Laws of 1913, page 546, Section 10, providing that the insurance commissioner shall at least once each year make a careful audit of books of each county, such officer is not restricted to making examination for an entire year. (Berridge v. Marion County, 391.)

Counties—Agents of State—Obligations.

4. Counties are governmental agencies of the state, and where the state by enactment, for governmental purposes, imposes a constitutional obligation on the county, the county must fairly meet it. (Mackenzie v. Douglas County, 442.)

Counties—Audit of Books—Powers of Insurance Commissioner.

5. Laws of 1913, page 546, Section 12, providing that audit of books of a county for years before or after 1914, may be made by or under supervision of the state insurance commissioner upon proper assurance that the expense will be borne by the county, authorizes the audit for years prior to 1914 only if the county agrees to pay the expense thereof, and for years after 1914 only for special audits other than the annual, and Section 14, authorizing employment of experts not to exceed the amount appropriated therefor, does not authorize the insurance commissioner to make a contract with expert accountants for a county, independent of its authorities so as to render the county liable for the cost, except where made by the commissioner. (Mackenzie v. Douglas County, 442.)

Counties—Statutes—Construction—Punctuation.

6. Laws of 1913, page 546, Section 12, as to audit of books of any "city, county school district," etc., though there is no official comma between "county" and "school district," will be construed as if the comma were present, so as to apply to counties, as required by the later provisions of the act. (Mackenzie v. Douglas County, 442.)

Counties—Audit of Books—Compensation of Experts—Liability.

7. A claim for compensation of experts who audited county books cannot be allowed under Laws of 1913, page 545, unless the complaint shows that the insurance commissioner made the audit, or that the county officials agreed to pay therefor. (Mackenzie v. Douglas County, 442.)

Counties—Actions—Remedy by Certiorari.

8. An ordinary action at law may be brought to recover the amount claimed under a contract with the county which had been rejected in part by the County Court, where there are questions of fact as well as of law involved, since on a writ of review the court cannot examine a disputed question of fact, but can consider only facts disclosed by the record. (Coos Bay Times Pub. Co. v. Coos County, 626.)

Counties—Officers—Authority—Publication of Tax Lists.

9. General Laws of 1913, page 576, requires the tax collector to publish in the newspapers selected by the County Court to publish court proceedings under Section 2902, L. O. L., a notice of delinquent taxes, which publication shall be for a price not exceeding the price prescribed by Section 2903, L. O. L. The latter section provides that compensation for the publication of lists and proceedings shall be fixed by the County Court not exceeding the limit therein specified. Section 937, L. O. L., gives the County Court the general care and management of the county property. *Held*, that the tax collector has no authority to contract for the publication of delinquent tax lists at a rate exceeding that fixed by the County Court. (Coos Bay Times Pub. Co. v. Coos County, 626.)

Counties—Officers—Authority—Publication of Tax Lists.

10. The provision of General Laws of 1913, page 576, that in counties of more than 100,000 inhabitants the County Court shall cause the delinquent tax lists to be published at a compensation therein definitely fixed, does not indicate an intention of the legislature to confer

on the tax collectors of other counties the authority to fix the compensation for such publication. (Coos Bay Times Pub. Co. v. Coos County, 626.)

COUNTY COURT.

See Certiorari, 1-3.

See Executors and Administrators, 1, 4.

See Infants, 3.

Adjudication of County Court in Escheat Proceeding.

See Escheat, 1, 2.

COURTS.

See Justices of the Peace, 1.

County Court Sitting as Juvenile Court.

See Infants, 3.

COVENANTS.

Covenants—Seisin—Breach.

1. An outstanding title does not breach a covenant of seisin going to a paramount right to the fee and possession until there is an eviction or something equivalent thereto. (Kreindring v. Mathews, 243.)

Covenants—Encumbrances—Breach.

2. An outstanding mortgage breaches a covenant against encumbrances when the deed is delivered. (Kreinbring v. Mathews, 243.)

Covenants—Seisin—Breach—Dower.

3. An outstanding right of dower is not technically an encumbrance, but an interest in the fee covered by a covenant of seisin, instead of by covenants against encumbrances. (Kreinbring v. Mathews, 243.)

See Mortgages, 4.

CRIMINAL LAW.

Criminal Law—Commitment—Signing by Judge.

1. Since Sections 582, 584, 591, 1578, 1593, 1594, L. O. L., relating to journal of Circuit Courts and commitment of convicted prisoner, do not direct the circuit judge to sign the journal or the commitment, he is not required to do so to render a commitment legal. (Long v. Minto, 281.)

Criminal Law—Judgments—Form—Oral.

2. A judgment is given by the act of the court in pronouncing sentence upon a person convicted of a crime. (Long v. Minto, 281.)

Criminal Law—Judgments—Memorial.

3. A memorial of the court's judgment is made when the clerk under Section 1578, L. O. L., performs the ministerial act of writing the entry in the journal. (Long v. Minto, 281.)

Criminal Law—Appeal—Perfecting Appeal—Transcript—Statute.

4. Under Sections 1610, 1611, L. O. L., whereby an appeal becomes perfected by serving and filing with the clerk a notice of appeal,

and Section 1621, as amended by Laws of 1913, page 496, providing that on appeal the clerk of the court where the notice thereof is filed must, within 30 days thereafter, or such further time as the court may allow, transmit a certified copy of the notice, certificate of cause, if any, and the judgment-roll, to the clerk of the Supreme Court, an appeal will be dismissed for failure to file the transcript within the time prescribed by law, unless the failure is shown to be due to the negligence of the clerk. (State v. Keeney, 478.)

Criminal Law—Perfected Appeal—Subsequent Appeal—Stipulation.

5. Where a defendant perfected his first appeal by serving and filing the notice required by the statute, he thereby exhausted his right of appeal, and it was not within the power of the parties to stipulate for a new notice and a new appeal. (State v. Keeney, 478.)

Criminal Law—Appeal and Error—Review—Invited Error.

6. Where defendant's counsel on direct examination asked the owner of the property if he confirmed the sale as reported to him, error in permitting the witness on cross-examination to answer substantially the identical question, which called for a conclusion of the witness, was invited. (State v. Stiles, 497.)

Criminal Law—Trial—Instructions—Assuming Facts.

7. A requested instruction that if the jury found that the owner of the property approved the terms of the contract of sale at or about the time it was signed then the sale was confirmed according to the terms of the contract, and there would be no larceny by defendant in retaining the money, and they should acquit defendant, was properly refused as assuming that certain terms offered by owner were accepted by prospective purchaser, and not submitting the question whether such a contract was consummated. (State v. Stiles, 497.)

Criminal Law—Trial—Instructions.

8. An instruction defining the word "bailee," although not predicated on any evidence, was not error, since the defendant having been charged with the crime of larceny by bailee, the definition of the word, or a general description of the relation which it implies, was proper. (State v. Stiles, 497.)

Criminal Law—Trial—Instructions.

9. An instruction that if the state proved beyond a reasonable doubt that the sale was not confirmed, that the money was delivered to defendant and that defendant failed to return it on demand, and contrary to the provision of his trust, the jury should find defendant guilty, the remainder of the instruction to which no exception was taken being that if the state failed to prove these various propositions beyond a reasonable doubt, the jury should find defendant not guilty, was properly given, as supported by evidence that the money was delivered to defendant conditionally. (State v. Stiles, 497.)

Criminal Law—Evidence—Other Offenses—Admissibility.

10. As a general rule, evidence of other and distinct crimes than that charged in the indictment cannot be given. (State v. McClard, 510.)

Criminal Law—Burning to Defraud Insurer—Evidence of Other Offenses.

11. Such rule is subject to exception in prosecutions for burning property to defraud the insurer, and evidence that accused secured insurance on other property at a different place, and the property was burned very soon thereafter, is admissible as tending to show the intent. (State v. McClard, 510.)

Criminal Law—Appeal—Scope—Preservation of Exceptions.

12. It is the duty of the accused in his bill of exceptions to negative the existence of evidence which might, under some theory, render admissible that which was excepted to, or to negative any theory under which it might be admissible, and if he does not do so, the court cannot say that the evidence complained of was inadmissible. (State v. McClard, 510.)

Criminal Law—Appeal—Incomplete Record.

13. On appeal from judgment of the Circuit Court dismissing complaint against defendant for violation of a city ordinance after conviction by the municipal court, where the only papers before the court were a copy of the original complaint, judgment in the municipal court, notice of appeal to the Circuit Court and the undertaking, the judgment of the Circuit Court, the notice of appeal on behalf of the state and its undertaking, the Supreme Court cannot determine whether the decision of the Circuit Court was erroneous. (Portland v. Grahs, 545.)

Criminal Law—Appeal—Decision.

14. On the city's appeal from judgment of the Circuit Court holding unconstitutional an ordinance under which defendant had been convicted in municipal court, the Supreme Court must affirm, though the ordinance was constitutional, if the facts disclose that defendant was innocent, since a sound ruling of the Circuit Court as to guilt or innocence must be sustained, notwithstanding the Supreme Court's dissent from the reasons upon which it was made. (Portland v. Grahs, 545.)

Criminal Law—Offenses—"Accomplice"—Who Is.

15. Section 2370, L. O. L., declares that all persons concerned in the commission of a crime, whether they directly commit the crime or aid and abet in its commission, are principals, while Section 1540 declares that a conviction cannot be had upon the testimony of an accomplice unless corroborated, and that evidence merely showing the commission of the crime or the circumstances thereof is not sufficient. Prohibition Act (Laws 1915, pp. 151, 155), Sections 5 and 9, denounce the sale or barter of intoxicating liquors, while Section 7 declares that it shall be unlawful for any person to solicit, take or receive any order for intoxicating liquors, or to make any contract for the sale of any intoxicating liquors except where the sale is permitted. There was no provision for the punishment of persons purchasing intoxicating liquors. *Held*, that neither a purchaser nor his agent in effecting a purchase of intoxicating liquors is an accomplice of the seller, and a conviction may be had on the uncorroborated testimony of either; an "accomplice" being a responsible person whose willful participation in the commission of a crime renders him liable to conviction,

though of course the agent of the seller would be an accomplice. (State v. Edlund, 614.)

Criminal Law—Trial—Jury Question.

16. When the evidence is conflicting as to whether a witness is an accomplice, the question should be submitted to the jury. (State v. Edlund, 614.)

Criminal Law—Appeal—Harmless Error.

17. In a prosecution for the sale of intoxicating liquors, where the court improperly charged that the buyer's agent was an accomplice, the seller cannot complain that the instruction did not declare the buyer to be an accomplice, and require corroboration of the agent other than by the buyer to justify a conviction, for the instruction as given was more favorable than the seller was entitled to; the agent not being an accomplice. (State v. Edlund, 614.)

CURATIVE ACT.

See Municipal Corporations, 5.

DAMAGES.

Damages—Elements—Injury to Business.

1. In an action on the case in which plaintiff alleges the conversion of personalty, the breach of an agreement in regard to the manner in which business should be conducted, and misrepresentations as to the ownership of property, all tending to the wrecking of plaintiff's business for the benefits of defendants, plaintiff is entitled to recover, not only for the value of her interest in the physical property converted, but for the resultant injury to the business. (Cash v. Garrison, 135.)

Damages—Duty to Reduce.

2. A municipal corporation is not liable for such continuing damage from a culvert diverting water on to land as could have been avoided by the exercise of reasonable and ordinary diligence by the land owner in preventing it. (Theiler v. Tillamook County, 277.)

See Carriers, 1, 2.

See Eminent Domain, 2-5.

See Negligence, 1.

See Vendor and Purchaser, 6.

Measure of.

See Fraud, 1.

DEATH.

Death—Evidence—Sufficiency—Cause of Death.

1. Evidence that deceased stood on one grounded guy wire, reached for a charged wire, and fell and was killed, is insufficient to sustain a verdict that the fatal fall was due to touching the charged wire rather than through loss of balance. (Medsker v. Portland Ry., L. & P. Co., 63.)

Death — Husband and Wife — Loss of Consortium — Wife's Right of Action.

2. At common law, the husband could maintain an action for injury to or death of his wife, whereby he lost her services or consortium; but the wife herself could not maintain a corresponding action to recover for the loss of services and consortium due from the husband to her. (*Kosciulek v. Portland Ry., L. & P. Co.*, 517.)

Death—Husband and Wife—Statutes.

3. Section 7050, L. O. L., which repeals all laws imposing or recognizing civil disabilities upon a wife which are not imposed or recognized as existing against the husband, does not confer on a wife any new right of action, but merely allows her to act independently of her husband for the redress in the courts for the infringement of rights which she already had. (*Kosciulek v. Portland Ry., L. & P. Co.*, 517.)

Death—Death of Husband—Wife's Right of Action.

4. Where a husband suffered personal injuries through the negligence of another, sued therefor and compromised, his widow, after his death, had no right of action for the consequential injury to her through loss of consortium and support; there being no statute giving the widow such a right of action. (*Kosciulek v. Portland Ry., L. & P. Co.*, 517.)

See Abatement and Revival, 1, 2.

See Appeal and Error, 4.

DECEIT.

See Attorney and Client, 5.

DEEDS.**Deeds—"Mental Capacity."**

1. "Mental capacity" at the time of signing a conveyance sufficient to comprehend the nature of the business in which the grantor is engaged is the standard fixed by the law for determining his competency. (*Magness v. Ditmars*, 598.)

Deeds—Competency of Grantor—Sufficiency of Evidence.

2. In suit involving the validity of a deed executed by defendant's father, evidence *held* to show that at the time of execution the father was mentally competent, knowing the nature of the business in which he was engaged, and fully understanding its effect. (*Magness v. Ditmars*, 598.)

Bank of Stream and not Meander Line is Boundary Line.

See Navigable Waters, 2.

DEFINITIONS.

See Words and Phrases.

DESCENT AND DISTRIBUTION.**Descent and Distribution—Executors and Administrators—Surcharging Administrator.**

1. Parties interested in an estate may surcharge an administrator's final account if he fails to reduce its choses in action to posses-

sion, and, if he refuses to collect debts owing the estate and properly apply the proceeds, the heirs may themselves realize upon them in the interest of the estate. (In re Marks' Estate, 632.)

DESERTION.

See Divorce, 2, 3.

DEVISE.

Agreement to Devise Real Property.

See Specific Performance, 1-3.

See Wills, 1, 2.

DISCLAIMER.

See Estoppel, 2.

DISCRETION OF CITY COUNCIL.

See Municipal Corporations, 6.

DISCRETION OF COURT.

See Appeal and Error, 21.

See Costs, 2.

See Eminent Domain, 5.

See Executors and Administrators, 4.

See Injunction, 4.

See Trial, 1.

DISMISSAL.

Of Teacher by Board of Directors.

See Schools and School Districts, 1, 2.

DISMISSAL AND NONSUIT.

Dismissal and Nonsuit—Suits in Equity—Remedies at Law.

1. In view of Sections 1, 389, L. O. L., in Oregon a distinction is made between actions at law and suits in equity, and although courts of law and equity are presided over by the same judges, a suit in equity must be dismissed where there is a remedy at law. (Spores v. Maude, 11.)

Dismissal and Nonsuit—Plaintiff's Right—Counterclaim.

2. Under Section 182, L. O. L., as to nonsuits, plaintiff has an absolute right at any time before trial to a voluntary nonsuit unless a counterclaim has been pleaded as a defense. (Chance v. Carter, 229.)

Dismissal and Nonsuit—Grounds—Unverified Pleading.

3. Where a complaint has been properly stricken from the files for want of a verification without leave to amend, the plaintiff has no standing in court, and the dismissal of the suit follows as a matter of course, irrespective of the reasons therefor given by the presiding judge. (Clark v. Clark, 405.)

See Appeal and Error, 2.

DISSOLUTION.

See Abatement and Revival, 3.

See Corporations, 1-3, 5.

DIVORCE.**Divorce Decree—Property Rights—Extraterritoriality.**

1. A decree of divorce rendered in Washington Territory, and subsequently modified by the Superior Court of Pierce County, Washington, when the statute empowered the court to give either spouse any or all of the property in its discretion, conferred upon the wife no title to land which the husband had in Oregon, since the Washington statute was confined in its operation to the property of parties within that state, and the decree did not so operate upon Section 511, L. O. L., relating to the disposition of real property by divorce decrees, as to convey any estate in the Oregon lands, as that provision applies to decrees rendered in Oregon. (Robinson v. Scott, 20.)

Divorce—Grounds—Willful Desertion—Statute.

2. Under Section 507, L. O. L., a dissolution of the marriage contract may be decreed in Oregon at the suit of the injured party for willful desertion for one year. (Herschback v. Herschback, 151.)

Divorce—Grounds—Desertion—Living Apart by Consent.

3. Where a wife, upon her marriage, with the consent of her husband, went to the home of her relatives to live until her husband could secure sufficient means to enable them to commence house-keeping, she could not be charged with deserting her husband until he had canceled his consent that she live with her relatives. (Herschback v. Herschback, 151.)

Divorce—Evidence—Sufficiency.

4. In a suit for divorce, evidence held to warrant a decree for plaintiff on the ground of cruel and inhuman treatment. (Ream v. Ream, 175.)

Divorce—Estate by Entirety—Effect of Divorce.

5. A divorce changes an estate by entirety to an estate in common. (Chase v. McKenzie, 429.)

DOWER.

See Covenants, 3.

DURESS.

See Bills and Notes, 2, 3.

See Mortgages, 11-13.

EASEMENT.**Easements—Grant for Future Enjoyment.**

1. There is no rule of law prohibiting the grant of an easement to take effect or to be enjoyed in the future. (Patterson v. Chambers Power Co., 328.)

Easements—Conveyance—Rights of Servient Owner.

2. The conveyance of an easement over land does not pass the title or interfere with the right of the owner of the soil to occupy it for any purpose not inconsistent with the easement. (Patterson v. Chambers Power Co., 328.)

Easements—Waters and Watercourses—Nature of "Easement."

3. A pure "easement" is one where the land of one person, which land is denominated the "servient tenement," is subjected to some use or burden for the benefit of the lands of another person, whose lands are termed the "dominant tenement"; but there are many water rights and rights of way for ditches which do not strictly come within this definition and yet are called "easements." (Patterson v. Chambers Power Co., 328.)

See Estoppel, 3.

See Vendor and Purchaser, 7.

See Waters and Watercourses, 1-12.

EJECTMENT.**Ejectment—Actions—Questions Involved.**

1. The action of ejectment involves both the right of possession and the right of property. (Chance v. Carter, 229.)

Ejectment—Setoff and "Counterclaim"—"Transaction."

2. Section 73, L. O. L., requires the answer to contain denials and any new matter constituting a counterclaim. Section 74 requires a counterclaim to be in favor of defendant against plaintiff, between whom a several judgment might be had in the action, and to arise out of a cause on contract, or transaction, set forth in the complaint as the foundation of plaintiff's claim, or, in actions on contract, any other cause on contract existing on commencement of the action. *Held* that, while the word "transaction" means more than "contract," and includes a business or other affair between the parties, yet, where plaintiff in ejectment merely alleged ownership and defendant's unlawful occupancy, defendant's answer merely claiming title was not a counterclaim, since neither revealed the transaction involved as the basis of plaintiff's claim. (Chance v. Carter, 229.)

Ejectment—Setoff and "Counterclaim"—What Constitutes.

3. In ejectment, where defendant answers under Section 328, L. O. L., claiming to be the absolute owner and denying plaintiff's interest, the answer is applicable only to one action, and is in no sense a counterclaim, although it permits defendant to secure affirmative relief. (Chance v. Carter, 229.)

ELECTION OF REMEDIES.

See Mechanics' Liens, 2.

ELECTIONS.**Elections—Notice—Condition Precedent.**

1. The notice of a special election required by law to be given constitutes a condition precedent, which must be observed to validate matters voted upon at such election. (Staples v. Astoria, 99.)

Elections—Primaries—Filing for Nomination—Statutes—Validity.

2. Although Laws of 1913, page 183, forbid nomination of candidates for public office by political parties except as provided by Sections 3349–3391, L. O. L., inclusive, as to direct primaries the legislature, by Laws of 1915, page 124, provided an additional method of nomination by filing and payment of fees which is valid in view of the facts that the legislature may amend an initiated statute, and that there is no conflict. (*Patton v. Withycombe*, 210.)

Elections—Nominations—Method—Powers of Precinct Committeemen —“Political Party.”

3. Section 3333, L. O. L., provides that any political party may, by certificate of nomination, nominate candidates. Section 3359 defines a political party to be an affiliation of electors which at the next general election preceding polled for congressman at least 25 per cent of the entire vote. Section 3343 provides for withdrawal of nominees. Section 3344 provides procedure in case of withdrawal or death. Section 3345 provides that the party nominating a candidate who has withdrawn may fill the vacancy. Section 3367 makes the provision of Sections 3343 and 3344 applicable in case of direct primary nominations only in case of death or removal from the district before election, but in no other case. Section 3389 empowers precinct committeemen to make nominations to fill vacancies among candidates caused by death or removal from the district, but not otherwise. The incumbent of office of state senator for the term ending in 1919 resigned in 1916 after the direct primary nominating election. Thereafter on notice a joint convention of precinct committeemen was held, and petitioner was nominated for the vacancy. *Held*, that, as no nomination was made at the direct primary nominating election, and as the vacancy did not occur through death or removal from the district, no nomination could be made to fill the vacancy. (*Coover v. Olcott*, 415.)

See Constitutional Law, 2.

ELEVATOR.

See Negligence, 3.

EMBEZZLEMENT.**Embezzlement—Larceny by Bailee—Evidence—Sufficiency.**

1. In a prosecution for larceny by bailee, alleged to have been committed by a real estate broker in retaining as a commission a sum of money received from a prospective purchaser as a first payment of purchase price, evidence *held* sufficient to sustain a finding that the purchaser parted with title to the money conditionally and only in case her proposal to give a chattel mortgage in part payment should be accepted by the owner of the property. (*State v. Stiles*, 497.)

Embezzlement—Evidence—Admissibility—Statute.

2. Under Section 1956, L. O. L., making it larceny for any bailee of money, etc., to wrongfully convert or neglect or refuse to deliver or account for money bailed, etc., according to the trust, intent not being an element of the crime, the exclusion of testimony of the owner of the property tending to show the intent with which the money was retained by the broker was not error. (*State v. Stiles*, 497.)

Embezzlement—Trial—Instructions.

3. A requested instruction that under the terms of the contract in evidence when the money was delivered to defendant, title passed with possession, and its retention would not constitute larceny, was properly refused, there being evidence that the money was delivered conditionally. (State v. Stiles, 497.)

Embezzlement—Indictment—Description of Money—Conversion by Trustee.

4. It is enough for an indictment under Section 1962, L. O. L., for conversion by a trustee to charge the conversion of "\$10,000" without alleging what kind of money it was; Section 1448, subdivision 6, declaring an indictment sufficient if the act charged as a crime is stated with such a degree of certainty as to enable a person of common understanding to know what is intended. (State v. Mishler, 548.)

EMINENT DOMAIN.**Eminent Domain—Exercise of Right—Power of State.**

1. The state has plenary right to prescribe the conditions upon which it will confer upon corporations the privilege of exercising the right of eminent domain. (Portland-Oregon City Ry. Co. v. Penney, 81.)

Eminent Domain—Damages—Increased Value—Statutes.

2. Under Section 6839, L. O. L., providing that no appropriation of private property shall be made until compensation therefor is made to the owner, irrespective of any increased value by reason of the proposed improvements, an owner cannot have any increased value which accrued to his land from a proposed improvement added to his damages, and the party condemning the land cannot have such increased value treated as a part of the compensation and deducted from the amount which would compensate if the land were purchased for any other purpose. (Portland-Oregon City Ry. Co. v. Penney, 81.)

Eminent Domain—Railroad Right of Way—Measure of Damages.

3. The measure of damages for the taking of land for a railroad right of way was the actual cash market value of the strip taken and the incidental depreciation in the market value of the part not included in the right of way. (Portland-Oregon City Ry. Co. v. Penney, 81.)

Eminent Domain—Damages—Evidence—Technical Error.

4. In a proceeding to condemn a strip of land for railroad right of way, the admission of the owner's testimony that before the railroad went through a certain party offered him \$2,300, and that he had agreed to sell it for \$2,500 cash, was technical error. (Portland-Oregon City Ry. Co. v. Penney, 81.)

Eminent Domain—Review—Discretion of Court—Damages—Evidence.

5. In proceeding to condemn a strip of land for railroad purposes, where it appeared that at about the time of the taking there was little or no active market for land in the vicinity, and that there were few sales by which to fix a standard market value, the admis-

sion of testimony of persons residing and owning land in the vicinity that lands situate near that taken were valued at from \$600 to \$800 an acre, and that it was suitable for gardening purposes, in view of the liberal rules as to the admission of evidence tending to show value, was not an abuse of such discretion. (Portland-Oregon City Ry. Co. v. Penney, 81.)

Eminent Domain—Review—Harmless Error—Admission of Evidence.

6. In a condemnation proceeding, technical error in permitting the owner to state what was offered him for his land and what he demanded was not reversible error, where such statement was merely his way of putting a value upon his land, and where the effect of his whole testimony was merely that he considered it worth a certain amount cash. (Portland-Oregon City Ry. Co. v. Penney, 81.)

EMPLOYERS' LIABILITY ACT.

See Master and Servant, 1.
See Negligence, 4.

ENCUMBRANCE.

See Appeal and Error, 14.
See Covenants, 2.

EQUITABLE DEFENSES.

See Appeal and Error, 14.
See Mortgages, 3.

EQUITABLE ESTOPPEL.

See Estoppel, 1.
See Municipal Corporations, 1.

EQUITY.

Equity—Remedy at Law—Title to Land.

1. Equity has no jurisdiction to settle titles, since one claiming title is entitled to a jury trial, and the remedy at law is complete. (Nolan v. Cook, 287.)

See Attachment, 2.
See Boundaries, 3.

As to Allowance of Costs in Equity Suits.

See Costs, 2.

A Remedy at Law is a Bar to a Suit in Equity.

See Dismissal and Nonsuit, 1.

EQUITY OF REDEMPTION.

See Mortgages, 8, 9.

EROSION.

See Navigable Waters, 3.

ESCHEAT.**Escheat—Pleading—Issues—Adjudication of County Court.**

1. In an escheat proceeding, where the state claimed personalty of deceased as well as the realty, and answering defendants pleaded an adjudication of the County Court, which, when proved, would utterly defeat the claim of the state as to the personalty and the state replied by denying that the County Court had made the adjudication, proof that the County Court made the order would prevent the personalty from being forfeited to the state, and it was therefore competent to introduce findings and order of the County Court. (State v. Finnigan, 538.)

Escheat—Pleading—Issues—Adjudication of County Court.

2. As the state's claim to the personalty made it necessary for the defendants to plead the order of distribution, a binding disclaimer by the state did not of its own force render incompetent the order and findings of the County Court. (State v. Finnigan, 538.)

Escheat—Trial—Instructions.

3. An instruction, that the fact for the jury to determine was whether deceased at the time of his death died without any heir, and that so far as the particular case was concerned before the jury could determine he died leaving heirs they would have to find that some of the parties set up in the answer were his heirs, was not improper as requiring the state to prove that the deceased left no heirs. (State v. Finnigan, 538.)

ESTATE IN COMMON.

See Divorce, 4.

ESTATES BY THE ENTIRETY.

See Divorce, 4.

See Husband and Wife, 1.

ESTOPPEL.**Estoppel—Equitable Estoppel—Acquiescence.**

1. Mere silence or "passive acquiescence" does not by itself create an irrevocable license or produce an estoppel. (Fraser v. Portland, 92.)

Estoppel—Grounds—Disclaimer.

2. In order to work an estoppel, a disclaimer must be so publicly made as to mislead another into believing that the person making it intended to abandon a right, and thereby induce that other to act to his injury in respect thereto. (Patterson v. Chambers Power Co., 328.)

Estoppel—Acquiescence—Easement.

3. That predecessors of the owner of an easement for raceway, with right of future enlargement, had, in maintaining it, asked permission of adjoining owners to bank upon their property mud and silt that had accumulated in the ditch, and had desisted when objection was made, is not evidence of acquiescence by such predecessors in a claim by adjoining owners adverse to future necessary enlargement of

the raceway, where in the conveyance of the original easement there was no right given to maintain the raceway by banking up such deposit on the side. (*Patterson v. Chambers Power Co.*, 328.)

Estoppel — Municipal Corporations — Public Improvements — Assessments.

4. A city is not estopped by unauthorized false statements of the city recorder as to the probable cost of an improvement from enforcing the assessment for the improvement. (*Parker v. Hood River*, 707.)

See Landlord and Tenant, 1, 2.

See Mortgages, 7, 13.

See Wharves, 1.

EUGENE, CHARTER OF.

See *Roney v. Lane County*, 372.

EVIDENCE.

Evidence—Presumptions—Statute.

1. Under Section 799, subdivision 33, L. O. L., providing that a thing once proved to exist continues as long as is usual with things of that nature, evidence that defendant was in possession of a sum of money two years prior to the supplemental proceedings, which does not show how long it is usual for such persons or anyone to retain a sum of money, is not aided by the disputable presumption declared by the statute, nor is it sufficient to show that defendant had the money until the time of the proceeding. (*Weigar v. Steen*, 72.)

Evidence—Conclusiveness on Party Introducing Witness.

2. Where a party calls a witness, he thereby represents him to be worthy of credit, or at least not so infamous as to be wholly unworthy of it. (*Sabin v. Kyniston*, 358.)

See Appeal and Error, 11, 29, 35.

See Certiorari, 2.

See Criminal Law, 10, 11.

See Death, 1.

See Deeds, 2.

See Divorce, 4.

See Embezzlement, 1, 2.

See Eminent Domain, 4-6.

See Exceptions, Bill of, 1.

See Fraudulent Conveyances, 1, 2, 5, 7, 8.

See Insane Persons, 2.

See Mortgages, 12.

See Reformation of Instruments, 3, 5.

See Specific Performance, 1, 2.

See Trial, 3, 5, 7.

Circumstantial Evidence.

See Fraudulent Conveyances, 1, 7.

EXCEPTIONS.**Necessity for Exceptions to Ruling of Court.**

See Appeal and Error, 32.

EXCEPTIONS, BILL OF.**Exceptions, Bill of—Incorporating Evidence.**

1. A bill of exceptions consisting of a *verbatim* report of the testimony for both parties given at the trial in the Circuit Court is not a proper bill. (Douglas Creditors' Assn. v. Hutchason, 644.)

See Criminal Law, 12.

EXECUTION.**Execution—Sale on Execution—Injunction.**

1. A sale upon execution will be enjoined in equity when it would constitute a cloud on the title of realty. (Townsend v. Chamberlain, 163.)

Execution—Execution Against Person.

2. Where the pleadings in an action for the recovery of money disclose no fraudulent actions on the part of defendant, his imprisonment under an execution against his person is unlawful. (In re Level, 298.)

Execution—Imprisonment Under Execution Against Person—When Authorized.

3. The imprisonment of petitioner, by virtue of an execution under a decree finding that he fraudulently and unlawfully retained money belonging to another, rendered on unauthorized findings of fact and conclusions of law by the referee, no other evidence being received and the decree not being based on any issue found in the pleadings, is unlawful, and petitioner is entitled to release in *habeas corpus* proceedings. (In re Level, 298.)

EXECUTORS AND ADMINISTRATORS.**Executors and Administrators—Sale of Realty—Jurisdiction of County Court.**

1. By the publication of a citation to some of the parties interested in an estate and personal service as to the others, the County Court acquired jurisdiction to make a decision on the matter of an administrator's application for an order to sell realty. (In re Marks' Estate, 632.)

Executors and Administrators—Sale of Realty—Order—Review.

2. In the absence of any direct provision for setting aside an order for an administrator's sale of realty, Section 103, L. O. L., providing that the court may allow an answer or reply to be made after the time limited by the Code, and may within one year after notice thereof relieve a party from an order taken against him through his mistake, inadvertence, etc., orders made in the exercise of the court's discretion are not reviewable except for abuse of discretion, and a refusal to vacate an order for an administrator's sale of realty on the ground

that it was made without actual notice to part of the petitioners was not an abuse of such discretion. (In re Marks' Estate, 632.)

Executors and Administrators — Sale of Realty — Order — Vacation—Answer.

3. Under Section 59, L. O. L., providing that defendants against whom publication has been ordered may, upon good cause shown, be allowed to defend within one year after judgment, parties seeking the vacation of an order for an administrator's sale of realty and for permission to make objections and defenses thereto would be denied relief for failure to tender an answer with the petition. (In re Marks' Estate, 632.)

Executors and Administrators—County Court—Removal of Administrator—Discretion.

4. County Courts are vested with a very large discretionary power over the conduct of executors and administrators. (In re Marks' Estate, 632.)

Executors and Administrators — Qualification — Surety of Former Administrator.

5. The surety of a former administrator is not necessarily disqualified from acting as administrator *de bonis non* because of a potential interest which may thereafter appear, but to justify his removal something more should appear, as the court cannot presume that he will squander the estate or fail to properly administer it. (In re Marks' Estate, 632.)

Executors and Administrators—Administrator's Indebtedness—Liability of Sureties.

6. If an administrator owes an estate, his debt will be reckoned as so much money on hand for which his sureties will be liable. (In re Marks' Estate, 632.)

See Descent and Distribution, 1.

EXEMPTIONS.

Exemptions—Construction of Statute.

1. Since exemption statutes are remedial in character, they are given a liberal construction. (Childers v. Brown, 1.)

Exemptions — Property Exempt—Construction of Statute—"Necessary"—"Occupation."

2. Under Section 227, L. O. L., as amended by Laws of 1915, page 27, making the team, vehicle, harness, etc., necessary to enable any person to carry on the trade, occupation or profession by which he habitually earns his living exempt from execution, the term "necessary" signifies "reasonably necessary" or "convenient" or "suitable," and does not mean "indispensable" or "absolutely necessary"; and standing alone, the word "occupation" means the principal business of one's life, habitual or stated employment, vocation, calling, trade, the business in which one principally engages to secure a living, the employment by which he generally gets his living, and includes any employment in which a person is engaged to procure a living. (Childers v. Brown, 1.)

Exemptions—Construction of Statute—Occupation.

3. Under such statute, it is not essential that the property should have been used exclusively to carry on the occupation by which one habitually earns his living, because an occasional use for other purposes will not defeat his right to exemption; and such right is not lost if the owner is not actually using the property in his occupation at the very time of the levy, or if temporarily, he is not engaged in his occupation, and is preserved if he honestly intends to use the property within a reasonable time to carry on his occupation. (Childers v. Brown, 1.)

Exemptions—Horse, Vehicle, Harness, etc.—Construction of Statute.

4. Under Section 227, L. O. L., as amended by Laws of 1915, page 27, exempting from execution a team, vehicle, harness, etc., necessary to enable anyone to carry on the occupation by which he habitually earns his living, the debtor may select and reserve a team, vehicle and harness without being obliged to show that he has no other like property, or to point out other property to the sheriff, even though he owns additional property of the same kind, and the debtor, if owning more than two horses, may select any two. (Childers v. Brown, 1.)

Exemptions—Construction of Statute—Assertion of Exemption—"At"—"As Soon As."

5. Under Section 227, L. O. L., as amended by Laws of 1915, page 27, exempting from execution a team, vehicle, harness, etc., necessary to enable one to carry on his occupation, if selected and reserved by the judgment debtor at the time of the levy or as soon thereafter before sale as it shall be known to him, a failure to select exempted property at the exact time of the levy, even though the debtor is present, will not alone operate as a waiver of his right, as the word "at," when used in reference to time, does not always mean the exact moment or day, but may express nearness and proximity, and consequently may denote a reasonable time, and as the words "as soon as" likewise have a restricted and an unrestricted signification; so that the debtor, if he acts before sale, may assert his right of exemption within a reasonable time after the levy becomes known to him, whether he was present or absent at the time of the seizure. (Childers v. Brown, 1.)

Exemptions—Waiver.

6. The right of exemption from execution is a privilege which may be waived by the consent of the debtor, or by his failure to assert his rights. (Childers v. Brown, 1.)

Exemptions—Right to Exemption—Burden of Proof.

7. A sheriff's seizure on attachment cannot be avoided, unless the debtor alleges and proves a situation bringing the property within the exemption statute, and avers and establishes every fact essential to the exemption. (Childers v. Brown, 1.)

FEDERAL COURT.**Conclusiveness of Judgment in State Court on Bankrupt's Property Rights.**

See Judgment, 2.

FINDINGS.

See Appeal and Error, 6, 12, 20.
See Reference, 1.
See Trial, 9.

FIRE INSURANCE.

See Insurance, 1, 2.
See Reformation of Instruments, 5.

FORECLOSURE.

See Appeal and Error, 14.
See Mortgages, 1, 3-6, 9-13.
See Reformation of Instruments, 3.

FRAUD.**Fraud—Damages—Difference Between Liability Incurred for Rent and Rental Value of Premises.**

1. Where a tenant was induced to take a five-year lease of an apartment house at \$10 instead of \$8 per room per month, by false representation of landlord's agent that another party had offered to take the lease for the higher price, and set up such claim in recoupment in action by the landlord for installments of the rent, the measure of his damages was the difference between the agreed rent and the reasonable value of the premises as of the date the contract was made. (Caples v. Morgan, 692.)

See Corporations, 6.
See Fraudulent Conveyances, 1, 2, 4.
See Landlord and Tenant, 4.
See Limitation of Actions, 1.
See Mortgages, 2.
See Reformation of Instruments, 4.
See Vendor and Purchaser, 2-4.

FRAUDS, STATUTE OF.

See Statute of Frauds.

FRAUDULENT CONVEYANCES.**Fraudulent Conveyances—Evidence—Sufficiency—Fraud—Circumstantial Evidence.**

1. In action to set aside a conveyance as fraudulent, it is not essentially requisite that there be direct proof of fraud, but the necessary deceit may be proven by circumstantial evidence. (Sabin v. Kyniston, 358.)

Fraudulent Conveyances—Evidence—Burden of Proof—Fraud.

2. In such action, one alleging fraud or any other material matter must prove it. (Sabin v. Kyniston, 358.)

Fraudulent Conveyances—Transaction Invalid—Knowledge of Grantee.

3. The title of a purchaser is protected from attack as based on fraudulent conveyance where, without knowledge or notice of ven-

dor's intent or of fraud, he has paid a valuable consideration, under Sections 7397, 7400, 7401, L. O. L., providing that every conveyance of any estate or interest in land made with the intent to hinder, delay, or defraud creditors or other persons of their lawful suits or demands as against the person so hindered, delayed or defrauded shall be void; that the question of fraudulent intent shall be deemed one of fact, not of law; and that the statute shall not affect the title of purchaser for valuable consideration unless it appears he had previous notice of the fraudulent intent of his immediate grantor of the fraud, rendering such grantor's title void. (Sabin v. Kyniston, 358.)

Fraudulent Conveyances—Burden of Proof—Knowledge by Purchaser of Fraudulent Intent of Grantor.

4. Under Section 7401, L. O. L., providing that the statute as to fraudulent conveyances shall not impair title of purchaser for valuable consideration unless it shall appear that he had previous notice of the fraudulent intent of his immediate grantor, one of the essentials which the plaintiff, in suit to set aside a conveyance as fraudulent, must establish is that the purchaser had previous notice of the fraudulent intent of his grantor. (Sabin v. Kyniston, 358.)

Fraudulent Conveyances—Evidence—Sufficiency—Notice to Grantee.

5. In suit to set aside a conveyance as fraudulent, evidence that there was a rumor current among farmers, in the neighborhood where land was situated, that grantor had been sued, the grantee living several miles distant, and no knowledge of this rumor being imputed to him, was not sufficient to show grantee's knowledge of fraud. (Sabin v. Kyniston, 358.)

Fraudulent Conveyances—Bona Fide Purchaser—Actual Notice.

6. Actual notice of fraudulent intent by vendor must be shown to avoid a sale to a purchaser paying a valuable consideration. (Sabin v. Kyniston, 358.)

Fraudulent Conveyances—Evidence—Knowledge of Grantee—Circumstantial Evidence.

7. Actual notice to grantee of fraudulent intent by vendor may be proven by circumstantial evidence. (Sabin v. Kyniston, 358.)

Fraudulent Conveyances—Evidence—Sufficiency—Payment of Valuable Consideration.

8. In action to avoid a conveyance as fraudulent, testimony of grantee, called as plaintiff's witness, of payment of valuable consideration, and testimony of his son as to remittances to such grantee for use in buying the land, held sufficient to show payment by grantee of valuable consideration. (Sabin v. Kyniston, 358.)

GUARDIAN.

See Insane Persons, 1, 2.

HABEAS CORPUS.

Habeas Corpus—Right to Bring—Lawfully Imprisoned Convicts.

1. Under Sections 627, 628, 631, 641, L. O. L., abolishing every other writ of *habeas corpus* than the writ of *habeas corpus ad sub-*

jiendum, and excluding persons imprisoned or restrained by virtue of the judgment of a competent tribunal of criminal jurisdiction from the right to prosecute such writ, the writ cannot be used to determine whether a person lawfully confined in the penitentiary is entitled to talk privately with an attorney, but such right, if it exists, must be asserted in some other proceeding. (Long v. Minto, 281.)

Habeas Corpus—Petition for Writ—Form.

2. Writ of *habeas corpus* will not issue where the petition does not conform to the requirements of Section 630, L. O. L., as to contents of petition for writ. (Long v. Minto, 281.)

HARMLESS ERROR.

See Appeal and Error, 16, 25, 29, 33.

See Criminal Law, 17.

See Eminent Domain, 6.

HIGH-WATER MARK.

Land Below High-water Mark of a River.

See Navigable Waters, 1.

HOOD RIVER, CHARTER OF.

See Parker v. Hood River, 707.

HUSBAND AND WIFE.

Husband and Wife—Property—Estate by Entirety.

1. An estate by the entirety is recognized in Oregon. (Chase v. McKenzie, 429.)

Husband and Wife—Actionable Interference With Marital Rights.

2. Marital rights are invaded, giving rise to a right of action in husband or wife, whenever a third person, through machination, enticement, seduction or other wrongful, intentional or malicious interference with the marital relation deprives the husband or wife of the consortium of the other; but a negligent wrong to the husband does not furnish a cause of action in favor of the other spouse unless by special legislative action. (Kosciolek v. Portland Ry., L. & P. Co., 517.)

See Choses in Action, 1.

See Civil Rights, 1.

See Death, 2-4.

IMPRISONMENT.

See Execution, 2, 3.

INDICTMENT.

Indictment—Following Language of Statute—Conversion by Trustee.

1. An indictment charging that defendant, being trustee of certain money for benefit of M., did, with intent to defraud, unlaw-

fully convert it to his own use and benefit, being in the language of Section 1962, L. O. L., denouncing the crime of wrongful conversion of property by a trustee, is sufficient. (State v. Mishler, 548.)

See Embezzlement, 4.

See Intoxicating Liquors, 2.

INFANTS.

Infants—Mother's Pension—Presence of Mother at Home.

1. Under Laws of 1913, page 75, providing in Section 1 for a mother's pension for the support of herself and of her child or children, and Section 5, providing it is the intent of the act to keep the children to which it is applicable together under the control of their mother, and that the mother shall make a home for the children, a mother did not forfeit her right to a pension by working away from the family residence some hours of the day, if such labor was necessary to contribute to their subsistence. (Finley v. Marion County, 294.)

Infants—Mother's Pension—Date of Accrual of Right to Pension.

2. Under such act, an applicant's right to pension accrued from the date of her application in proper form. (Finley v. Marion County, 294.)

Infants—Mother's Pension—Power of County Court Sitting as Juvenile Court.

3. Under the terms of such act, the County Court, sitting as a Juvenile Court, can grant no other relief than that provided for in the act. (Finley v. Marion County, 294.)

Infants—Mother's Pension—Repeal.

4. The passage of the amendatory Mother's Pension Act of 1915 (Laws 1915, p. 97) did not repeal any provisions of the Mother's Pension Act of 1913 (Laws 1913, p. 75) so as to affect an amount then due and accrued under the act of 1913, although no action on application therefor was taken until after enactment of 1915 act. (Finley v. Marion County, 294.)

Infants—Mother's Pension Act—Repeal—Vested Rights.

5. No person disqualified by the 1915 amendatory Mother's Pension Act (Laws 1915, p. 97) is entitled to have her pension continued after that law went into effect. (Finley v. Marion County, 294.)

INITIATIVE AND REFERENDUM.

See Constitutional Law, 1.

See Municipal Corporations, 3, 4, 9, 10.

See Statutes, 1.

INJUNCTION.

Injunction—Defenses—Inconvenience to Public.

1. Sometimes equity will decline to enjoin an act, though an admitted legal right has been violated, where intervening public rights would be seriously affected without a correspondingly great advantage to complainant. (Fraser v. Portland, 92.)

Injunction—Sewers—Defenses—Inconvenience to Public.

2. Where a land owner, who, when advised by a city's representative that a sewer was planned across his land, said he would fight it, and afterward found the sewer had been so constructed, and demanded injunction to compel removal of sewer, *held* he was entitled to relief, despite the claim of public inconvenience. (*Fraser v. Portland*, 92.)

Injunction—Against Maintenance of Sewer—Continuing Wrong.

3. Equity will enjoin the maintenance of an unauthorized sewer across one's land, since it is a trespass producing a continuing wrong. (*Fraser v. Portland*, 92.)

Injunction—Restraining Order—Discretion of Court.

4. The granting or refusal of restraining orders rests in the sound discretion of the court; but this discretion is not an arbitrary one, and it must be exercised in accordance with the principles of equity and good conscience. (*Coopey v. Keady*, 218.)

Injunction—Real Property—Cutting and Removal of Timber.

5. The cutting and removal of brush and timber on a swale leading from a mill-race across plaintiff's premises to a river, to the use of which swale defendant had no right, and which would permit the river to further encroach upon plaintiff's premises, was a willful trespass upon his land which a court of equity would enjoin. (*Mathews v. Chambers Power Co.*, 251.)

Injunction—Relief—Permanent Injunction.

6. Where it appeared that a few trees remained in the swale which should be protected because the roots tended to prevent the river from washing away its banks, an injunction was properly made perpetual, so as to prevent a repetition of the trespass. (*Mathews v. Chambers Power Co.*, 251.)

See Appeal and Error, 13, 34.

See Execution, 1.

See Municipal Corporations, 2.

See Telegraphs and Telephones, 1.

INSANE PERSONS.**Insane Persons—Guardian—"Incapable" Person.**

1. Persons "incapable of conducting their own affairs" for whom, in addition to insane persons and idiots, Section 1319, L. O. L., authorizes the appointment of a guardian, are persons unable without assistance properly to manage and take care of their property, and who would be likely to be deceived, dominated, or imposed on by artful or designing persons; it not being enough that one does not handle his property judiciously. (*In re Northcutt*, 646.)

Insane Persons—Guardian—Incapable Person—Evidence.

2. Evidence in proceeding for appointment of a guardian for one 77 years old, about to marry and move to another state, with the idea of building a lighting plant, *held* not to show that he was incapable of conducting his own affairs, within Section 1319, L. O. L. (*In re Northcutt*, 646.)

INSTRUCTIONS.

See Appeal and Error, 22, 26.
See Criminal Law, 7-9.
See Embezzlement, 3.
See Escheat, 3.
See Trial, 1-6, 8.

INSURANCE.**Insurance—Fire Insurance—"Blanket Policy."**

1. A blanket policy of fire insurance covers to its full amount every item of property described in it, and, if the loss of any portion of the property exhausts the full amount of the policy, the whole insurance must be paid; hence the existence of an average clause in a blanket policy involves a contradiction of terms. (Carlton Lumber Co. v. Lumber Ins. Co., 396.)

Insurance—Reformation of Policies—Carelessness of Insured in Examining Policies.

2. The carelessness of the insured in not examining insurance policies, *held* not of such character as would prevent the reformation of the policy by striking therefrom an average clause, thus making the policy a blanket policy. (Carlton Lumber Co. v. Lumber Ins. Co., 396.)

See Mortgages, 15-18.

INSURANCE COMMISSIONER.

See Counties, 3, 5, 7.

INSURANCE POLICY.**Reformation of Insurance Policy.**

See Insurance, 1, 2.
See Reformation of Instruments, 5.

INTENT.

See Contracts, 1.

INTOXICATING LIQUORS.**Intoxicating Liquors—Illegal Sale—Statute.**

1. There are three necessary elements to the crime of selling intoxicants without a license in violation of Section 4938, L. O. L., as amended by Laws of 1913, page 505: First, defendant must have sold intoxicating liquor; second, must have sold it outside the limits of any incorporated city or town; and, third, must have sold without a license. (State v. Aplin, 621.)

Intoxicating Liquors—Illegal Sale—Indictment—Sufficiency—Statute.

2. An indictment, charging that defendant, on a specified date in a specified county "then and there being, did then and there unlawfully sell two quarts of malt liquors, to wit, beer to [another] without first obtaining a license therefor as provided by law," was insuffi-

cient to charge the offense denounced by Section 4938, L. O. L., as amended by Laws of 1913, page 505, relative to the sale of intoxicants, as failing to allege the necessary element of the crime that the sale was outside the limits of an incorporated town. (State v. Aplin, 621.)

JOINT ADVENTURES.

Joint Adventures—Advances—Rights of Party to Sell.

1. Where an investment company agreed to sell lots at a certain price, and agreed to and loaned money to the other parties to an agreement for a joint venture in building a house for sale, and such other parties failed to purchase the lots or make any sale of the house and lots, the investment company was entitled to sell, substantially as in foreclosure to obtain its advances. (Northwestern Transfer Co. v. Investment Co., 75.)

JUDGMENT.

Judgment—Lien—Docketing Judgment of Federal Court—Constructive Notice.

1. Where judgment of the United States court was not docketed in the county where land was situated until long after conveyance from judgment debtor to purchaser, there was no imputed notice to the purchaser of the determination of the cause in the United States court, under Sections 210–212, L. O. L., providing that United States court judgments shall be a lien from the time of docketing a transcript in any county, etc. (Sabin v. Kyniston, 358.)

Judgment—Conclusiveness—State Court—Effect in Federal Court.

2. A judgment or decree of a state court in an action in which a trustee in bankruptcy is a party and appears and contests the bankrupt's property rights is conclusive upon the latter's estate, and estops his creditors from controverting such final determination even in the federal court which has secured jurisdiction of the bankruptcy proceeding. (Van Zandt v. Parson, 453.)

Judgment—Conclusiveness—Title to Property.

3. It having in a suit between E. and R. been finally decreed that R. was owner of certain land, which he claimed as successor to E.'s vendee, and that E. had no interest therein, E. is estopped, in a suit to enjoin defendant city from paying R. the purchase price thereof, whether suing as claimant to the property or as taxpayer, to assert that R., or the city as his grantee, has no title to the property. (Elwert v. Knapp, 525.)

Judgment—Foundation—"Pleadings."

4. Pleadings are the formal written allegations by the parties of their respective demands and defenses, and are employed to state the ultimate facts, which, when uncontroverted, or when established by evidence at the trial, afford the foundation upon which a judgment or decree must necessarily rest. (Treadgold v. Willard, 658.)

See Abatement and Revival, 2.

See Corporations, 2.

See Criminal Law, 2, 3.

On Mandate from Supreme Court.

See Appeal and Error, 28.

Payment of Prior to Filing Attorney's Lien.

See Attorney and Client, 4.

JUDGMENT DEBTOR.

See Mortgages, 10.

JURISDICTION.

See Attachment, 2.

See Boundaries, 3.

See Executors and Administrators, 1.

See Judgment, 2.

See Reformation of Instruments, 6.

JUSTICES OF THE PEACE.**Justices of the Peace—Tenure—"Court"—"Judge."**

1. Within Article VII, Sections 1, 2, of the Constitution, as amended November 8, 1910, providing that the judicial power shall be vested in the Supreme Court and such other courts as may be created by law, that the judges thereof shall be elected for six years, and that the courts and judicial system, except as expressly changed by the amendment shall remain as at present till otherwise provided, a Justice's Court is a "court" and a justice of the peace a "judge"; the original sections providing for justices of the peace with limited judicial powers. (Webster v. Boyer, 485.)

JUVENILE COURT.

See Infants, 3.

KNOWLEDGE.

See Fraudulent Conveyances, 3, 4, 7.

LANDLORD AND TENANT.**Landlord and Tenant—Estoppel to Deny Landlord's Title—Termination by Surrender.**

1. A tenant's estoppel to deny his landlord's title ceases when he surrenders to the landlord possession of the demised premises. (Treadgold v. Willard, 658.)

Landlord and Tenant—Estoppel to Deny Landlord's Title—Termination—Character of Surrender.

2. A tenant's relinquishment of possession of the demised premises to the landlord, which will terminate his estoppel to deny the landlord's title, must be complete, open and made in good faith. (Treadgold v. Willard, 658.)

Landlord and Tenant—Liability for Rent—Escape from.

3. A tenant who enters into possession of demised premises pursuant to the terms of the lease can escape liability for rent thereunder

only by being evicted by the holder of the paramount title or by compulsory attornment to him, or, when notified of the assertion of such superior right, by surrendering possession to his landlord. (Treadgold v. Willard, 658.)

Landlord and Tenant—Action for Rent—Questions for Jury—False Representations.

4. In action for rent, where defendant sought to recoup damages for being induced by false representation to execute the lease for a higher rental than he would otherwise, the issue whether the false representation did have the effect of inducing defendant to agree to the higher price was for the jury's determination. (Caples v. Morgan, 692.)

Landlord and Tenant—Action for Rent—Recoupment.

5. In an action for rent, that the tenant, by false representations of the landlord's agent that another party was seeking a lease of the premises at a higher price, was induced to execute the lease at such higher price, was a good defense by way of recoupment. (Caples v. Morgan, 692.)

See Wharves, 2.

LARCENY.

See Embezzlement, 1.

LAW OF THE CASE.

See Appeal and Error, 19.

LAWS OF OREGON.

Cited and Construed in this Volume.

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LEASE.

See Statute of Frauds, 2.

See Wharves, 2, 3.

LIENS.

See Attorney and Client, 2-4.

See Judgment, 1.

See Mortgages, 14.

See Municipal Corporations, 17.

LIMITATION OF ACTIONS.

Limitation of Actions—Defenses—Fraud.

1. The statute of limitations cannot be urged against a mere defense, such as that defendant was fraudulently inveigled into the contract sued on, but such a defense lasts as long as the contract it affects; the statute of limitations applying only to one who seeks affirmative relief. (Caples v. Morgan, 692.)

LOGS AND LOGGING.**Logs and Logging—Conveyances—Construction.**

1. A conveyance of all the timber on designated land, coupled with a condition that it should be removed within ten years from the date thereof, amounted only to a sale of all the timber the grantee could cut and remove before that date. (*Kreinbring v. Mathews*, 243.)

MANDATE.**Lower Court to Follow Directions Implicitly.**

See Appeal and Error, 27.

MARITAL RIGHTS.

See Husband and Wife, 2.

MASTER AND SERVANT.**Master and Servant—Master's Duty—Employers' Liability Act.**

1. Under Employers' Liability Act (Laws 1911, p. 16), Section 1, an elevator company, employing a constructor's helper to do repair work upon the premises of a realty company and having charge of such work and control of the situation, was bound to use every device, care and caution which it was practicable to use for the protection and safety of life and limb. (*Gunnell v. Van Emon Elevator Co.*, 408.)

Master and Servant—Action for Injury—Question for Jury—Control of Place of Work.

2. In an action by plaintiff, employed by an elevator company as a constructor's helper, for injury while on the premises of a realty company engaged in the repair of an elevator, evidence that the elevator company assumed control of the elevator in the adjoining shaft by which plaintiff was injured *held* sufficient to take the case to the jury on the issue of failing to provide a safe place in which to work. (*Gunnell v. Van Emon Elevator Co.*, 408.)

Master and Servant—Injuries to Servant—Contributory Negligence—Statute.

3. Under the Employers' Liability Act (Laws 1911, p. 18), Section 6, declaring that the contributory negligence shall not be a defense, but may be considered by the jury in fixing damages, in an action for injuries by the employee of a stevedore company, an instruction that, if the plaintiff was guilty of negligence contributing to injury, he could not recover, even though the defendant was also guilty of negligence, was properly refused. (*Nelson v. Brown & McCabe*, 472.)

Master and Servant—Injuries to Servant—Assumption of Risk—Statute.

4. In actions for personal injuries by employees coming within the scope of the Employers' Liability Act, the doctrine of assumption of risk by the employee is abrogated. (*Nelson v. Brown & McCabe*, 472.)

Master and Servant—Injuries to Servant—Safe Place to Work—Statute.

5. Under the Employers' Liability Act (Laws 1911, p. 18), Section 1, providing that persons having charge of work involving risk or danger must use every device or care practicable for the protection of life and limb, in an action for personal injuries by the employee of a stevedore company, an instruction that, if the defendant had provided a reasonably and ordinarily safe place for the plaintiff to work, considering the character of the work, defendant could not be found negligent in not providing a safe place for the plaintiff to work, was properly refused. (Nelson v. Brown & McCabe, 472.)

Master and Servant—Injuries to Servant—"Accident."

6. In relation to the law of master and servant, an "accident" is an incident that could not have been reasonably foreseen, anticipated, prevented or provided against, and for it the master is not liable. (Nelson v. Brown & McCabe, 472.)

MEANDER LINES.

See Boundaries, 1.

MEASURE OF DAMAGES.

See Carriers, 1, 2.

See Damages, 1.

Taking Land for Railroad Right of Way.

See Eminent Domain, 3.

Tenant Induced to Lease by False Representations of Landlord's Agent.

See Fraud, 1.

MECHANICS' LIENS.**Mechanics' Liens—Implied Consent of Owner.**

1. Under Section 7416, L. O. L., providing that any person furnishing material shall be held to be the agent of the owner for the purposes of the act, that the goods were furnished at the instance of a clerk of the contractor, the contractor knowing nothing of the transaction, will not defeat the lien. (Peerless Pacific Co. v. Rogers, 51.)

Mechanics' Liens—Reliance on Credit of Building—Election.

2. A materialman is not required to elect between his lien on the property and the contractor's personal liability, and reliance on one does not impair the other. (Peerless Pacific Co. v. Rogers, 51.)

Mechanics' Liens—Reliance on Credit of Building—Presumption.

3. Where a complainant has complied with the provisions of the lien law and has done nothing to exclude the idea, it is presumed the credit of the building was relied on. (Peerless Pacific Co. v. Rogers, 51.)

Mechanics' Liens—Furnishing Direct to Building.

4. It is not essential to a mechanic's lien that the material be furnished or delivered direct to the improvement, if, in fact, the

materials were delivered for use in the building and were used in its construction. (Peerless Pacific Co. v. Rogers, 51.)

MEDFORD, CHARTER OF.

See Phipps v. Medford, 119.

MISTAKE.

See Reformation of Instruments, 4, 8,
See Vendor and Purchaser, 2.

MORTGAGES.

Mortgages—Foreclosure by Action—Pleading—Cross-complaint.

1. In a suit to foreclose a mortgage, a grantee of the mortgagor, if all the parties are before the court, may by cross-complaint seek reformation of his deed of the premises, by striking out a clause fraudulently inserted therein obligating him to pay the mortgage. (Bradshaw v. Provident Trust Co., 55.)

Mortgages—Transfer of Property—Assumption of Mortgage Debt—Fraud.

2. In such case, if the fraud is proved, or that the clause was inserted in the deed without the grantee's knowledge, he is not liable thereon to mortgagee. (Bradshaw v. Provident Trust Co., 55.)

Mortgages—Action to Foreclose—Equitable Defense.

3. In a suit to foreclose a purchase money mortgage, an answer, admitting the making of the mortgage, but alleging that the mortgagee falsely represented that he was the owner of the land described in the mortgage, and that it was free from all encumbrances, and that there was valuable timber on it which he owned, and that the mortgagor, relying upon such false representations, purchased and received a general warranty against encumbrances, that the purchase money, except the mortgage note in suit, had been paid, and that the outstanding and unexpired right to cut and remove the timber amounted to more than the note, so that there was a total failure of consideration to the mortgagor's damage, if insufficient as a counterclaim, contained all the elements of a valid defensive answer, good in equity. (Kreinbring v. Mathews, 243.)

Mortgages—Foreclosure—Covenants.

4. Such outstanding and unexpired right to cut and remove timber was a breach of the covenant against encumbrances which would have to be disposed of before equity would foreclose the purchase money mortgage. (Kreinbring v. Mathews, 243.)

Mortgages—Foreclosure—Redemption.

5. Section 422, L. O. L., provides for personal judgment on mortgage foreclosure where a note or other personal obligation has been given, while Section 423 provides that any person having a lien subsequent to plaintiff, or who has given a note or other personal obligation for the payment of the debts secured by the mortgage, shall be made a party defendant. Plaintiff purchased land, giving a purchase money mortgage. Thereafter he resold the land, his grantees assuming pay-

ment of the purchase money mortgage, and delivering to plaintiff notes secured by a second mortgage; these, plaintiff negotiated. On foreclosure of the purchase money mortgage, plaintiff was made a party, as was the second mortgagee, and judgment of foreclosure was entered; personal judgment being rendered against plaintiff. Section 245 declares that redemption may be made, first by the judgment debtor or his successor in interest; second, by a creditor having a lien by judgment on any portion of the property. *Held* that, upon rendition of a personal judgment against him, plaintiff became a judgment debtor entitled to redeem. (Higgs v. McDuffie, 256.)

Mortgages—Foreclosure—Redemption.

6. Under Section 427, L. O. L., declaring that a decree of foreclosure shall have the effect to bar the equity of redemption, grantees of the mortgagor, who assumed payment of the mortgage but defaulted, have no right of redemption after foreclosure; personal judgment being rendered only against the mortgagor. (Higgs v. McDuffie, 256.)

Mortgages—Redemption—Estoppel.

7. Where mortgaged land was conveyed and the grantee assumed payment, the grantor is not estopped, the grantee having defaulted in payment of the mortgage, to assert his right of redemption; personal judgment against the mortgagor having been rendered on foreclosure. (Higgs v. McDuffie, 256.)

Mortgages—"Equity of Redemption."

8. In modern jurisprudence, the words "equity of redemption" designate the fee-simple estate of the mortgagor encumbered by the mortgage, and it is this that is conveyed by deed of the mortgagor, and by provision of Section 427, L. O. L., is barred by decree of foreclosure. (Higgs v. McDuffie, 256.)

Mortgages—Foreclosure—Right to Redeem.

9. Under Section 427, L. O. L., providing that a decree of foreclosure shall bar the equity of redemption, there is, after the foreclosure, no right to redeem because of the prior ownership of the equity of redemption. (Higgs v. McDuffie, 256.)

Mortgages — Foreclosure—Redemption—Judgment Debtor — Successor in Interest.

10. Where, in foreclosure after conveyance of the land by the mortgagor, there is personal judgment against him alone, he is the judgment debtor, and his grantee of the land is not his successor, within Sections 245, 427, L. O. L., giving right to redeem to the judgment debtor or his successor in interest; this referring to his successor in interest as judgment debtor. (Higgs v. McDuffie, 256.)

Mortgages—Validity—Duress—Threats of Imprisonment.

11. Where defendants to save their son from the penitentiary, executed notes and mortgages in payment of money embezzled by him, the taking by them of a chattel mortgage from such son as partial indemnity, on the suggestion of the mortgagee's agents, does not estop them from interposing the defense of duress in an action to foreclose the real estate mortgages. (Baldwin Co. v. Savage, 379.)

Mortgages—Foreclosure—Defenses—Duress—Waiver—Evidence—Sufficiency.

12. Evidence *held* insufficient to warrant a finding that defendants waived their defense of duress to the foreclosure of mortgages by securing a postponement of the trial by promising to pay the amount. (Baldwin Co. v. Savage, 379.)

Mortgages—Foreclosure—Defenses—Duress—Estoppel.

13. In foreclosure, defendants are not estopped from asserting the invalidity of the mortgages by reason of duress, consisting of threats to imprison their son for embezzlement by the payment of a chattel mortgage after the statute of limitations, Section 1377, L. O. L., had barred the prosecutions of such son. (Baldwin Co. v. Savage, 379.)

Mortgages—Cancellation—Intervening Liens—Restoration.

14. Where the holder of a realty mortgage cancels it in ignorance of the existence of an intermediate lien upon the premises, though such lien is of record, a court of equity in a suit instituted therefor will, in the absence of intervening rights, restore the original lien and give it priority; but, where a bid upon the execution sale of the lot had been credited on account of the judgment, such credit was an intervening right which could not be set aside so as to restore the original lien. (Chase v. McKenzie, 429.)

Mortgages—Insurance—Constructive Trust.

15. Where a mortgagor is bound either by the mortgage or by a valid verbal agreement to insure the property as further security, the mortgagee is entitled to an equitable lien on the insurance money, and the proceeds when collected by the mortgagor are held in trust for the benefit of the mortgagee. (Butson v. Misz, 607.)

Mortgages—Agreement to Insure—Oral Agreement—Amount of Insurance.

16. An oral agreement to insure mortgaged premises, which does not state the amount to be taken out, ordinarily requires the proper amount of a policy upon the building. (Butson v. Misz, 607.)

Mortgages—Insurance—Right to Proceeds—Mortgagee.

17. Where an insurance policy is taken out by the mortgagor, who had agreed to insure for the benefit of the mortgagee, equity will treat the policy as payable to the mortgagee as his interest may appear. (Butson v. Misz, 607.)

Mortgages—Insurance—Mortgagee's Right to Insurance Money.

18. Equity has jurisdiction of a suit to enforce a mortgagee's right to the proceeds of insurance on the premises, since he is entitled to have the specific fund held intact for him, and an action at law would not afford an adequate remedy. (Butson v. Misz, 607.)

See Bills and Notes, 2, 3.

MOTHER'S PENSIONS.**Date of Accrual of Right to Pension.**

See Infants, 1-5.

MOTION.

See Appeal and Error, 19.

MUNICIPAL CORPORATIONS.**Municipal Corporations—Construction of Sewer—Equitable Estoppel.**

1. A land owner who, when advised by a city's representative that a sewer was planned across his land, said he would fight it, and afterward found the sewer had been so constructed, *held* not estopped to demand, in injunction suit, removal of the sewer and cancellation of assessment against his land for the cost of the sewer. (Fraser v. Portland, 92.)

Municipal Corporations—Injunction—Decree.

2. A municipality was required to remove a sewer constructed without authority across complainant's land, unless, within a reasonable time, right of way therefor was acquired, and to cancel assessment made against complainant for its cost, but without prejudice to any right of reassessment. (Fraser v. Portland, 92.)

Municipal Corporations—Initiative and Referendum—Failure to Publish Notice.

3. Where an ordinance requires the publication of a notice of a proposed initiative measure, amending the city charter, for a certain time, failure to publish such notice at the required time will vitiate the amendment. (Staples v. Astoria, 99.)

Municipal Corporations—Initiative and Referendum—Notice—Publication.

4. Under Ordinance 4799 of the City of Astoria, touching notice of a special election at which charter amendments were to be submitted, where February 16th and 17th, more than 30 days prior to such an election and after passage of the ordinance proposing the amendment and containing its text, the officers of the city posted 82 notices of the election in the different wards, and caused a notice of election containing the charter amendments to be published in the official newspaper of the city once each day for 12 successive issues, the first insertion appearing March 1 and the last March 14, 1916, the election being held March 22, 1916, there was a compliance with the ordinance. (Staples v. Astoria, 99.)

Municipal Corporations—Public Improvements—Assessments for Benefits—Notice—Curative Act.

5. Though a city charter provided for notice to adjacent property owners at least ten days before commencing construction of a sewer, a sewer having been constructed without such notice an initiative amendment to the charter providing for the levy on realty for sewers after construction, was valid, and applied to such sewer, as it would have been permissible in the first place to allow construction without previous notice, and it being within legislative power by subsequent enactments to dispense with or obviate any previous provision which might have been originally omitted. (Phipps v. Medford, 119.)

Municipal Corporations—Public Improvements—Assessments—Exercise of Legislative Discretion—Review by the Courts.

6. In a suit to remove a cloud from the title of real estate said to consist of an assessment attempted to be levied to pay for the sewer, in the absence of fraud or criminality on the part of the city officials, the assessments of the tax being an exercise of municipal power referable to the legislative discretion of the city council, a fault in the construction of the sewer is not open to the court's inquiry. (Phipps v. Medford, 119.)

Municipal Corporations—Public Improvements—Assessments—Decree of Invalidity—Reassessment.

7. A decree of the court declaring void an assessment of taxes upon adjacent owners for construction of a sewer affected only the assessment there involved, and cannot prevent any future levy under the charter as amended by Section 132a, providing for levy on adjacent realty for sewers after construction. (Phipps v. Medford, 119.)

Municipal Corporations—Amendment of Charter.

8. Under Article XI, Section 2, of the Constitution, conferring power upon the voters of every city or town to amend their charters, to the extent that a legislative charter is inconsistent with a change wrought by the legal voters in that instrument, the latter expression of the legislative power vested in them must prevail. (Phipps v. Medford, 119.)

Municipal Corporations—Public Improvements—Special Assessments—Assessments for Completed Work.

9. The initiative amendment to the charter of Medford is a valid exercise of municipal power to levy special assessments, although it provides for levying an assessment for work already executed. (Phipps v. Medford, 119.)

Municipal Corporations—Charter Provisions—Construction.

10. Where an initiative municipal charter provision was so designed as to embrace the whole subject matter and was in conflict with the legislative charter, the earlier enactment yields to the later. (Phipps v. Medford, 119.)

Municipal Corporations—Public Improvements—Special Assessments—Time of Assessment.

11. Under Medford Charter, Section 132a, providing that, regardless of defects in former proceedings, the common council may commence anew and proceed to levy an assessment for the improvement, it is not necessary for assessment after completion of the improvement that there shall have been an earlier and defective proceeding, but the assessment may be made at any time after the improvement. (Phipps v. Medford, 119.)

Municipal Corporations—Improvements—Reassessments—Statute.

12. Medford Charter, Section 132a, providing for reassessment in case of defective proceedings on proper notice and after time is fixed for considering protests, is a proper exercise of the legislative power, committing such hearing to the municipal council. (Phipps v. Medford, 119.)

Municipal Corporations—Improvements—Assessments—Decision of Council—Collateral Attack.

13. In a suit to remove a cloud from plaintiff's title alleged to result from the action of the municipal council assessing a tax for municipal improvements, its decision must be respected on collateral attack, in the absence of allegation of fraud in the procedure. (Phipps v. Medford, 119.)

Municipal Corporations — Street Improvements — Sidewalks — Remonstrance.

14. Under a city's charter (Sp. Laws 1893, p. 245), in terms giving right of remonstrance against improvement of a street or alley by grading or graveling, there is no right of remonstrance against laying of sidewalks by the city at the expense of the abutting realty. (Klov Dahl v. Springfield, 168.)

Municipal Corporations—Street Improvements—Remonstrance.

15. A remonstrance against street improvements should show that its signers are the owners of two thirds of the adjacent property, necessary under the charter to be effectual. (Klov Dahl v. Springfield, 168.)

Municipal Corporations—Assessment Ordinance—Description of Land.

16. Description of land in an assessment ordinance is sufficient, if with it a surveyor, either with or without the aid of extrinsic evidence, could locate the premises with reasonable certainty, though, while the land is in block 2, it is recited to be lots in block 21. (Klov Dahl v. Springfield, 168.)

Municipal Corporations—Sidewalk Construction—Waiver of Lien.

17. A city does not waive its lien for an assessment for construction of a sidewalk, because it does not immediately issue its warrant for the collection at the end of the 20 days in which the tax may be paid by the land owner. (Klov Dahl v. Springfield, 168.)

Municipal Corporations—Alteration—Detachment of Territory.

18. Under Article IV, Section 1a, and Article XI, Section 2, of the Constitution, authorizing voters of a municipality to amend its charter, the electors may change the corporate boundaries by excluding territory previously included within its limits. (Flavel Land Co. v. Leinenweber, 353.)

Municipal Corporations—Taxation—Charter Provisions—Construction.

19. Eugene City Charter, Sections 114, 115, exempting the city from road taxes levied by the County Court, refers only to road taxes levied under Sections 6320, 6321, L. O. L., and is inapplicable to general taxes raised under Sections 937, 6278, although they are used for road purposes. (Roney v. Lane County, 372.)

Municipal Corporations—Recovery of Benefit Assessment—Voluntary Payment.

20. Where plaintiff paid a benefit assessment to have the lien on his lots discharged so that he might make a sale of the property, and he was not entrapped by sudden pressure of city's agent into making the payment, and was not without other remedy, his payment was voluntary. (Moffitt v. Salem, 686.)

Municipal Corporations—Public Improvements—Assessment of Benefits—Refund—Parties Entitled.

21. Plaintiff voluntarily paid a benefit assessment, under an agreement with the city treasurer to return it if illegal, and, the assessment being declared void, City Charter of City of Salem, Section 52, was amended to authorize the return of the assessment to the record owners of property when the amendment was adopted. *Held*, that the right to recover money voluntarily paid in discharging a void tax must be found in a statute or ordinance authorizing it, and the agreement with the city treasurer was invalid, and therefore plaintiff's grantees, and not plaintiff, were the proper parties to receive the money. (*Moffitt v. Salem*, 686.)

Municipal Corporations—Public Improvements—Assessments—Irregularities—"Waiver."

22. An express waiver, in a bond given under Section 3245 et seq., L. O. L., on application to pay an assessment for a municipal improvement under the terms of that act, of irregularities or defects in the proceedings for the improvement, does not affect a supplemental assessment therefor levied long after, of which the party could have no knowledge, since a "waiver" exists only when one, with full knowledge of material fact, does or forbears to do something inconsistent with the existence of the right or of his intention to rely on that right. (*Parker v. Hood River*, 707.)

Municipal Corporations—Public Improvements—Assessments—Validity.

23. An assessment of \$485.44 for a street improvement, the estimated cost of which was \$255, being an excess of more than 90 per cent over the estimate, is so unreasonable as to invalidate it. (*Parker v. Hood River*, 707.)

See Estoppel, 4.

NAVIGABLE WATERS.

Navigable Waters—Waters and Watercourses—Land Below High-water Mark—Nature of.

1. Land below the high-water mark of a river or stream is part of the bed of the stream or river. (*Armstrong v. Pincus*, 156.)

Navigable Waters—Deeds—Construction.

2. Plaintiff's intestate sold land abutting on a stream, under an agreement providing that if, upon survey, there should be less than 271 acres, the purchase price should be rebated. Upon resurvey it was found that since the land had been patented from the government the land had eroded, so that the present ordinary high-water mark was within the meander lines run by the government surveyor. *Held*, that as the bank of the stream, and not the meander line, formed the boundary, land which lay below the ordinary high-water mark was properly excluded on resurvey, for the loss by erosion, just as any gain by accretion, falls on the owner in possession. (*Armstrong v. Pincus*, 156.)

Navigable Waters—Waters and Watercourses—Accretion—Right to.

3. Where land abuts on a stream, the owner is entitled to any accretions formed. (*Armstrong v. Pincus*, 156.)

NEGATIVE PREGNANT.

See Pleading, 2, 3.

NEGLIGENCE.**Negligence—Contributory Negligence—Failure to Reduce Damages.**

1. The failure of plaintiff to reduce damages suffered by the exercise of reasonable care is not contributory negligence, which is such an act or omission on plaintiff's part amounting to an ordinary want of care as, concurring or co-operating with the negligent act of defendant, is the proximate cause or occasion of the injury complained of; while a failure to reduce damages does not preclude recovery, but merely affects the amount recoverable. (*Theiler v. Tillamook County*, 277.)

Negligence—Contributory Negligence—Duty to Observe and Avoid Danger.

2. An invitee at a sawmill was negligent where he saw that a plank was about to be thrown down to a platform on which he was standing, and then looked away without taking further precautions, and was injured thereby. (*Young v. Prouty Lumber Co.*, 318.)

Negligence—Condition of Premises—Elevator.

3. The owner of a building in which an elevator was operated was bound to take reasonable care and precaution against injuries to a constructor's helper in the employ of an elevator company engaged in repairing such elevator. (*Gunnell v. Van Emon Elevator Co.*, 408.)

Negligence—Master's Liability—Contributory Negligence.

4. Under Employers' Liability Act, Section 6, the contributory negligence of the person injured is not a defense, but may be taken into account in fixing the amount of the damages. (*Gunnell v. Van Emon Elevator Co.*, 408.)

See Reformation of Instruments, 2.

NEWSPAPERS.**Newspapers—Contracts—Publication of Tax Lists.**

1. The selection of official newspapers and establishing of the compensation for notices published therein by the County Court, and the acceptance of such appointment by a newspaper by doing the work with knowledge of the rate designated, constitutes a contract for the printing of the list at the rate specified, which neither party can thereafter ignore. (*Coos Bay Times Pub. Co. v. Coos County*, 626.)

NEW TRIAL.

See Appeal and Error, 11.

NOMINATION.

See Constitutional Law, 2.

See Elections, 2, 3.

NOTICE

See Appeal and Error, 17, 18, 24, 36.
 See Attorney and Client, 2.
 See Elections, 1.
 See Fraudulent Conveyances, 5-7.
 See Judgment, 1.
 See Municipal Corporations, 3-5.
 See Partnership, 3.
 See Schools and School Districts, 2.
 See Vendor and Purchaser, 1, 7, 8.

OFFICERS.

Officers—Grants of Power—Construction.

1. Acts conferring statutory powers on an officer are strictly construed. (Mackenzie v. Douglas County, 442.)

Officers—Compensation of Expert—Liability.

2. The right of an officer to demand expenses incurred by him in the performance of official duty must be found in the Constitution or the statute conferring it, either directly or by necessary implication; and a private citizen cannot have any greater right in this respect. (Mackenzie v. Douglas County, 442.)

See Counties, 9, 10.

OREGON CASES.

Applied, Approved, Cited, Distinguished, Followed and Overruled in this Volume.

See Table in Front of this Volume.

OREGON CONSTITUTION.

Cited and Construed in this Volume.

See Table in Front of this Volume.

OREGON STATUTES.

Cited and Construed in this Volume.

See Tables (Code and Session Laws) in Front of this Volume.

PARENT AND CHILD.

Parent and Child—Support of Child—Enforcement—Statutory Proceedings.

1. Under Section 7054, L. O. L., requiring parents to maintain their children when poor and unable to work, and Section 2922, providing that every poor person, who shall be unable to earn a living, shall be supported by the father, mother, children, brothers or sisters of such person, if they or either of them be of sufficient ability, and every person who shall fail to support his or her father, mother, child, brother or sister when directed by the County Court shall forfeit \$30 a month to the poor fund of the county, and such other sums as the County Court shall deem sufficient, to be recovered in the name of the County Court, the procedure to compel the support of an incapacitated adult child by a parent, provided by the latter section, is exclusive,

and the Supreme Court cannot, on appeal in proceedings to have the father of such child declared a mental incompetent, order the father to pay for the support of the child pending the determination of the appeal. (In re Northcutt, 646.)

PAROL EVIDENCE.

See Reformation of Instruments, 6.

PARTIES.

See Appeal and Error, 4, 17, 18.

See Corporations, 4, 5.

See Principal and Agent, 2.

PARTNERSHIP.

Partnership—Creation.

1. An agreement between several parties to build a house, containing no stipulation to share in the losses and profits of the business, establishing no community of interest between the parties in the subject matter of the contract, and manifesting no intention of the parties to become partners, did not create a partnership. (Northwestern Transfer Co. v. Investment Co., 75.)

Partnership—Character of Member.

2. Each member of a partnership is a principal with a joint interest in the partnership property, and an agent of the other partners in dealing with third persons concerning partnership transactions. (Northwestern Transfer Co. v. Investment Co., 75.)

Partnership—Notice.

3. Notice to one partner, in reference to any matter relating to a transaction within the scope of the firm's business, is notice to all. (Northwestern Transfer Co. v. Investment Co., 75.)

PAYMENT.

Payment—Voluntary Payment in Discharge of Voidable Obligation—Recovery.

1. A payment, voluntarily made in the discharge of a note and mortgage, cannot be recovered although the note and mortgage were procured by duress, consisting of threats of imprisonment. (Baldwin & Co. v. Savage, 379.)

Payment—Right to Receipt.

2. Under section 876, L. O. L., providing that whoever pays money is entitled to a receipt therefor from the person to whom the payment is made, and may demand a proper signature as a condition of the payment, an attorney employed to collect claims, who kept his clients advised of the true state of the business, and promptly, on receipt of their money from the debtor, paid them what was due them under the agreement for collection, was entitled to a receipt for the money. (State ex rel. v. Farrin, 489.)

See Attorney and Client, 4.

Voluntary Payment or Benefit Assessment.

See Municipal Corporations, 20.

Unauthorized Payments to Principal.

See Principal and Surety, 2.

PERSONAL INJURIES.

See Appeal and Error, 22, 25, 26.

See Death, 4.

See Master and Servant, 1-6.

See Negligence, 3, 4.

See Trial, 5.

PLEADING.**Pleading—Defects—Reply—Aider by Verdict.**

1. In replevin for a team, wagon and harness attached by defendant sheriff, the taking of which was justified by his answer, a reply claiming an exemption and right to a return of the property under the statute (Section 227, L. O. L., as amended by Laws of 1915, page 27), exempting from execution a team, vehicle, harness, etc., necessary to enable one to carry on the occupation by which he habitually earns his living, showing that the property was being used by plaintiff for the purpose of earning a living for the support of his family, and that it was the only property of the kind which he could use, and that it had been habitually used for that purpose, was sufficient after verdict. (Childers v. Brown, 1.)

Pleading—Reply—Denial—Negative Pregnant.

2. In action for death from negligent operation of defendant's auto truck, a reply consisting of conjunctive denials of conjunctive allegations of contributory negligence was insufficient as a denial thereof. (White v. East Side Mill Co., 107.)

Pleading—Denial—Negative Pregnant.

3. Material facts alleged conjunctively must be denied disjunctively. (White v. East Side Mill Co., 107.)

Pleading—Denials—Sufficiency.

4. Denial that plaintiff's decedent carelessly or negligently stepped in front of defendant's truck, or failed to look out for his safety, is not a denial of doing such acts, but only of the manner of doing, especially where by demurrer, or by motion for judgment on the pleading, plaintiff's attention was directed to the deficiency of the allegation, which he refused to cure. (White v. East Side Mill Co., 107.)

Pleading—Conclusion of Law.

5. The statement of the complaint that "notice was not given as required by the charter," instead of stating the facts, leaving the court to draw the conclusion whether or not the charter requirements were fulfilled, is but a conclusion of law, not issuable, and not requiring denial, and giving plaintiff no standing to litigate lack of jurisdiction from failing to give notice as required. (Klov Dahl v. Springfield, 168.)

Pleading—Setoff and Counterclaim—Requisites.

6. A counterclaim must be complete in itself, and show that defendant could recover if he first sued for that purpose. (Chance v. Carter, 229.)

Pleading—Setoff and Counterclaim—Sufficiency.

7. In an action on a promissory note, a counterclaim alleging that notes were procured by false representations, but not alleging that

plaintiff's officer who made the false representations was then acting within the scope of his authority, *held* not to state a defense. (Meadow Valley Land Co. v. Manerud, 303.)

Pleading—Verification—Striking Out.

8. It is proper to strike a pleading from the files when it is not properly verified. (Clark v. Clark, 405.)

Pleading—Matter Provable Under General Denial.

9. Defendant county having denied approval of water-master's claims for services, a further answer that the claims were conditionally approved, but wrongfully filed contrary to the conditions, is demurrable; such matter being admissible under general denial. (Brewster v. Crook County, 435.)

Pleading—Supplying of Averment by Adverse Pleading.

10. In an action for rent, where the averment of the complaint respecting the description of the premises was defective, but the answer set forth a copy of the lease, giving a complete description, such answer remedied the defective state of the complaint, since, if a responsive pleading supplies material averments omitted by an adverse party, the question of who so makes the indispensable averment is unimportant, though the order of pleading may be irregular. (Treadgold v. Willard, 658.)

Pleading—Amendment—Surprise.

11. In action by landlord for rent installments, where defendant counterclaimed for being induced by false representations to execute a lease of the premises for enhanced rental, allowing defendant during trial over plaintiff's objection, to amend his answer so as to call his claim a setoff and recoupment instead of counterclaim, and to change the prayer to one that plaintiff take nothing and defendant be dismissed, was not error; it not being shown that plaintiff was surprised or her rights prejudiced thereby. (Caples v. Morgan, 692.)

See Banks and Banking, 2.

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See Executors and Administrators, 3.

See Habeas Corpus, 2.

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See Reformation of Instruments, 8, 9.

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See Evidence, 1.

See Mechanics' Liens, 3.

PRIMARIES.

See Elections, 2.

PRINCIPAL AND AGENT.**Principal and Agent—Actions—Issues, Proof and Variance.**

1. Under an averment that plaintiff himself made a contract with defendant railway, he could show that it was made through his agent, though the agent did not disclose that plaintiff was the principal. (*Levy v. Nevada-California-Oregon Ry.*, 673.)

Principal and Agent—Undisclosed Principal—Actions—Parties.

2. Though a contract was made by an agent who did not disclose his principal, the principal is the proper party in interest, and may maintain action for breach of the contract. (*Levy v. Nevada-California-Oregon Ry.*, 673.)

PRINCIPAL AND SURETY.**Principal and Surety—Liability of Surety Company—Construction.**

1. The rule of *strictissimi juris*, usually available to sureties without compensation, is generally relaxed when applied to a paid surety, so that a bonding company must show that its rights have been injuriously affected before it can defeat its contract. (*Neilson v. Title Guaranty & Surety Co.*, 422.)

Principal and Surety—Clearing Contract—Discharge of Surety—Unauthorized Payments to Principal.

2. Under a contract to clear and plow a tract at a certain price per acre, aggregating a certain amount for the entire work, and stipulating that on or before the fifth day of each month the owner or his agent should pay to the contractor the amount then due for work completed upon an estimate made by the owner or his agent, secured by a surety bond, providing that on default of the principal the surety might complete the contract, and should be subrogated to the rights and properties of the principal, including deferred payments and credits due the principal at default, or to become due thereafter, the owner's payment of nearly one half of the contract price on demands of the contractor, and without any information on which to make a real estimate, made before the contract was abandoned and when no part of the work was entirely completed and when not an eighth part of it was done, was such a payment as to relieve the surety. (*Neilson v. Title Guaranty & Surety Co.*, 422.)

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PURCHASE MONEY.**Foreclosure of Purchase Money Mortgage.**

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QUESTION FOR JURY.

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QUESTION FOR THE COURT.

See Certiorari, 1, 3.

See Trial, 4.

QUIETING TITLE.**Quieting Title—Cloud on Title—Assessment Ordinance.**

1. If an assessment ordinance utterly fails to describe one's property, it does not constitute a cloud on his title. (Klov Dahl v. Springfield, 168.)

RACEWAY.

See Waters and Watercourses, 7, 11, 12.

RAILROADS.

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RECOUPMENT.

See Landlord and Tenant, 5.

Nature of.

See Setoff and Counterclaim, 4.

REDEMPTION.

See Mortgages, 5-10.

REFERENCE.**Reference—Authority of Referee—Findings of Fact and Conclusions of Law.**

1. Under section 838, L. O. L., a referee in an equitable proceeding has no authority to make findings of fact or conclusions of law. (In re Level, 298.)

REFORMATION OF INSTRUMENTS.**Reformation of Instruments—Nature of Remedy.**

1. The reformation of a deed is a remedy peculiar to a court of equity. (*Spores v. Maude*, 11.)

Reformation of Instruments—Grounds—Negligence.

2. In such case, the failure of the grantee to read the deed before accepting it is not such negligence as will bar his relief. (*Bradshaw v. Provident Trust Co.*, 55.)

Reformation of Instruments—Sufficiency of Evidence.

3. In a suit to foreclose against a grantee of the mortgagor pleading that he did not assume the mortgage and asking for reformation of his deed, the evidence showed that he did not agree to assume it, but that a clause purporting so to obligate him was inserted in one of eleven similar deeds without his knowledge. (*Bradshaw v. Provident Trust Co.*, 55.)

Reformation of Instruments—Grounds—Mistake or Fraud.

4. Generally, where a memorandum in writing fails to conform to the contract between the parties in consequence of their mutual mistake, however induced, or the mistake of one party and fraud of the other, a court of equity will reform the instrument so as to make it conform to the actual stipulation of the parties. (*Bradshaw v. Provident Trust Co.*, 55.)

Reformation of Instruments—Insurance Policy—Evidence—Sufficiency.

5. Where plaintiff, lessee of a sawmill, installed new equipment and took out insurance policies thereon, evidence *held* sufficient to require reformation of such policies by striking therefrom an average clause, thus making them a "blanket policy." (*Carlton Lumber Co. v. Lumber Ins. Co.*, 396.)

Reformation of Instruments—Equitable Jurisdiction—Parol Testimony.

6. Equity will exercise its jurisdiction for the correction or reformation of a written instrument on the ground of mutual mistake, and for such purpose will receive parol testimony. (*Coates v. Smith*, 556.)

Reformation of Instruments—Between What Parties.

7. Reformation of a written instrument on the ground of mutual mistake will be decreed in a court of equity as between the original parties or those claiming under them in privity, such as judgment creditors. (*Coates v. Smith*, 556.)

Reformation of Instruments—Mistake—Pleading.

8. In a suit to reform a deed or written contract on the ground of mistake, plaintiff should plead the particular circumstances constituting the mistake. (*Coates v. Smith*, 556.)

Reformation of Instruments—Suit to Reform Note and Mortgage—Complaint—Sufficiency.

9. In a suit to reform a note and mortgage against the mortgagors and the trustee in bankruptcy of one of them, where the complaint

did not show that it was the intention of the parties that an alleged oral agreement as to the time of payment of interest should be incorporated in the note, nor that it was not the intention of either of the parties to rely upon the oral agreement, averred to have been made both before and after the execution of the note, and did not disclose when the alleged omission was discovered by plaintiff, nor what instructions were given the scrivener, or by whom, asserting no fraud on the part of the mortgagors, the circumstances relating to the transaction, as set forth, being very meager, such complaint was insufficient against demurrer on the ground that it did not state facts sufficient to constitute a cause of action. (Coates v. Smith, 556.)

See Insurance, 2.

REFUND.

Recovery of Amount Paid for Benefit Assessment.

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RIGHT OF WAY.

See Eminent Domain, 3.

SAFE PLACE TO WORK.

See Master and Servant, 5.

SALEM, CHARTER OF.

See Moffit v. Salem, 686.

SALES.**Sales—Executory Contracts—Effect.**

1. A contract to purchase a number of cords of wood on cars or at station, at various prices, which fails to state the time of payment or delivery, is an executory contract under which title does not pass until delivery, and the purchaser could have action only for breach of contract, and not in replevin. (*Kondo v. Aylsworth*, 225.)

See Execution, 1.

See Executors and Administrators, 1-3.

SCHOOLS AND SCHOOL DISTRICTS.**Schools and School Districts—Teachers—Discharge—Statute — “But.”**

1. Laws of 1913, page 304, Section 1, subdivision 22, provides that the board shall dismiss teachers only for good cause shown, and if it passes an order to dismiss, the material reason therefor shall be spread on the record by the district clerk. Subdivision 23 provides that a teacher unjustly dismissed may take an appeal from the board's action to the county superintendent, and thence to the superintendent of public instruction, but for a breach of contract of teaching the teacher or the district shall have their ordinary legal remedies, and that on the trial of a teacher the board, etc., shall give him notice of charges and an opportunity to be heard; and subdivision 7 requires a written contract of hiring to be made and filed specifying wages, etc. Section 3950, L. O. L., authorizes the state board of education to make general rules, one of which required teachers to inculcate correct principles of morality and a proper regard for the government, and Section 4057 required the board to provide a United States flag. Plaintiff, having a written contract to teach, and who taught disloyalty to the government and a disbelief in God, and who failed to fly the national flag provided by the board, after a refusal to obey the school directors' instructions, was dismissed. *Held*, in her action for salary under the contract, that the term “but for a breach of contract of teaching the teacher or the district shall have their ordinary legal remedies” did not limit the power to dismiss to breaches of the contract of teaching, and that it extended also to acts rendering a teacher undesirable; the word “but” limiting or restraining the effect of something which has before been said, and indicating that what follows is an exception to that which has gone before, and not controlling that which follows it. (*Foreman v. School Dist. No. 25*, 587.)

Schools and School Districts—Teachers—Dismissal—Notice.

2. Under such subdivision 22, a minute of dismissal having been made upon a piece of paper, the board action was not defeated, where it was so made because its clerk was sick, on which account it was not entered in the district clerk's record-book. (*Foreman v. School Dist. No. 25*, 587.)

SEISIN.

See Covenants, 1, 3.

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SETOFF AND COUNTERCLAIM.

Setoff and Counterclaim—When Maintainable—Tort and Contract.

1. In an action in tort, a counterclaim arising *ex contractu* cannot be maintained. (Kondo v. Aylsworth, 225.)

Setoff and Counterclaim—What Constitutes—"Counterclaim."

2. The distinction between actions at law and suits in equity has not been abrogated, so that to constitute a counterclaim in a law action it is not enough that defendant's claim be merely "connected with the subject of the action." (Chance v. Carter, 229.)

Setoff and Counterclaim—Pleading—Sufficiency.

3. In an action on a promissory note, an answer alleging that defendant leased a horse to plaintiff, which was injured and died through plaintiff's want of care, *held* to state a counterclaim on contract, not on tort, under section 74, L. O. L. (Meadow Valley Land Co. v. Manerud, 303.)

Setoff and Counterclaim—"Recoupment"—Nature.

4. "Recoupment" is the keeping back or stopping something which is due, and under the principles of the common law, recoupment could be invoked when defendant sustained damages from plaintiff's non-performance of the contract sued on, in which case the damages to which the defendant was entitled could be abated from plaintiff's claim. (Caples v. Morgan, 692.)

See Pleading, 6, 7.

SEWERS.

See Injunction, 2, 3.

SIDEWALKS.

See Municipal Corporations, 14, 17.

SPECIFIC PERFORMANCE.

Specific Performance—Agreement to Devise—Sufficiency of Evidence.

1. In a suit for specific performance of an agreement by defendant's deceased relative to devise to plaintiff certain realty in consideration of her promise to care for him and furnish him a home during the remainder of his life, evidence *held* to show the making of such agreement. (Woods v. Dunn, 457.)

Specific Performance—Agreement to Devise—Consideration—Sufficiency of Evidence.

2. In a suit for specific performance of an agreement between the defendant's deceased relative and plaintiffs, whereby he covenanted to devise to plaintiff certain land in consideration of her promise to care for him and furnish him a home during his life, evidence *held* to show that plaintiff had fully performed all the conditions thereof. (Woods v. Dunn, 457.)

Specific Performance—Agreement to Devise—Adequacy of Consideration.

3. Under such agreement, made when deceased was 64 years of age and having a life expectancy of 11 years, who was uncouth in

person and habit, requiring special attention, food and ever-increasing care, and made after he had had the advice of an attorney and understood the nature of the agreement, and after he had become dissatisfied with living with his relatives, and when he had property amounting to over \$52,000, of which the part agreed to be devised was valued at about \$12,000, the consideration was not so inadequate as to make its performance unreasonable and unjust, where deceased lived only four or five months after the agreement was made. (Woods v. Dunn, 457.)

SPRINGFIELD, CHARTER OF.

See Klov Dahl v. Springfield, 168.

STATUTE OF FRAUDS.

Frauds, Statute of—Memorandum—Agreement to Devise Realty.

1. An agreement to devise real property is not within Section 808, L. O. L., providing that an agreement for the leasing or sale of real property, or any interest therein, shall be void unless it, or some memorandum thereof, expressing the consideration, be in writing, subscribed by the party to be charged, or by his lawfully authorized agent. (Woods v. Dunn, 457.)

Frauds, Statute of—Leases—Term for Years—Oral Negotiations.

2. In an action for rent on five-year lease, where defendant sought recoupment of damages from false representation of plaintiff's agent that another party desired the lease at a higher price, inducing defendant to execute the lease at such higher price, the oral negotiations of the parties concerning the lease were inadmissible under Section 808, L. O. L., providing that leases for a longer period than one year are void if not in writing, and no evidence of such agreement shall be received other than the writing, or secondary evidence of its contents, in the cases prescribed by law. (Caples v. Morgan, 692.)

STATUTES.

Statutes—Initiative Statutes—Legislative Repeal.

1. The Constitution does not deny to the legislature the right to amend or repeal a statute enacted by the people in the exercise of the initiative. (Patton v. Withycombe, 210.)

Statutes—Repeal—Constitutional Requirements.

2. Even though an independent act, complete within itself, works a repeal by implication, the repealing statute is not pregnable for failure to observe Article IV, Section 22, of the Constitution, declaring that no act shall be revised or amended by mere reference to its title, but the act amended shall be set forth at full length. (Patton v. Withycombe, 210.)

Statutes—Construction—"Proviso."

3. While a proviso is commonly found at the end of the act or section, and is usually introduced by the word "provided," that word is not necessary, the matter and not the form of the succeeding words controlling; a "proviso" necessarily containing a condition or limitation upon the preceding matter. (Mackenzie v. Douglas County, 442.)

Statutes—Construction—General Words.

4. The general intent will be controlled by the particular intent subsequently expressed. (*Mackenzie v. Douglas County*, 442.)

Statutes—Construction—Punctuation.

5. Although punctuation may be resorted to as an aid in construction when it tends to throw light on the meaning, yet it may be disregarded when it would tend to convey a meaning not in consonance with the rest of the act. (*Mackenzie v. Douglas County*, 442.)

Statutes—Charter—Effect of Partial Invalidity.

6. A provision in a city charter for personal liability on an assessment for municipal improvements, if invalid, does not vitiate the charter in other respects. (*Parker v. Hood River*, 707.)

See Abatement and Revival, 1.

See Acknowledgment, 2, 4.

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Liability of Stockholders in Banking Corporations.

See Banks and Banking, 1, 2.

Liability of for Unpaid Subscriptions for Stock.

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SUBSTITUTION.

See Appeal and Error, 4.

See Corporations, 5.

SURCHARGING.**Account of Administrator.**

See Descent and Distribution, 1.

SURVEYS.

See Boundaries, 1.

TAXATION.**Taxation—Assessment—Designation of Owner.**

1. An assessment of land to "J. P. Walker and to all owners and claimants known or unknown" was void, and rendered the tax sale and deed void. (Robinson v. Scott, 20.)

Taxation—Board of Equalization—Duties.

2. It is the duty of the board of equalization to correct assessments if they be excessively high or unreasonably low, and it has no authority to punish an applicant by refusing to equalize an incorrect assessment merely because such applicant failed to file a statement of its property as required by law. (First Nat. Bank v. Board of Equalization, 240.)

Taxation—Board of Equalization—Correction of Assessments.

3. Under Section 3571, L. O. L., requiring the assessor to deduct from the aggregate amount of capital stock, surplus and undivided profits, the amount of investments in real estate and base his assessment upon the remainder, *held* that the failure of a bank to furnish the assessor a verified statement of its property within the time required by Sections 3569 and 3570 is no sufficient reason for the refusal of the board of equalization to equalize such assessment, thus penalizing the bank by a double tax on its real estate. (First Nat. Bank v. Board of Equalization, 240.)

See Counties, 1, 2.

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Publication Notice of Delinquent Tax Lists.

See Counties, 9, 10.

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TEACHERS.

See Schools and School Districts, 1, 2.

TELEGRAPH AND TELEPHONES.**Telegraphs and Telephones—Compelling Connection Between Companies—Injunctive Relief.**

1. Where a bank installed in its building a private intercommunicating telephone system, with its own instruments, with which the H. telephone company connected, the bank could not in suit against the P. telephone company, have injunctive relief to compel the latter to connect its system to the bank's thus effecting a connection of the two telephone systems, competitors, the H. company not being a party to the suit, until the Public Service Commission fully considered all questions involved; injunction being an extraordinary remedy, which will not be granted unless the Public Utilities Act (Laws 1911, p. 483) will work harmoniously as a result. (First Nat. Bank v. Pacific Tel. & Tel. Co., 307.)

THREATS.

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Failure to File, Appeal Dismissed.
See Criminal Law, 4.

TRESPASS.

Court of Equity will Enjoin Willful Trespass.
See Injunction, 5.

TRIAL.**Trial—Cautionary Instruction—Discretion of Court.**

1. Refusal of a cautionary instruction is within the discretion of the trial court. (Childers v. Brown, 1.)

Trial—Requested Instructions—Given Instructions.

2. Requested instructions, given in substance, were properly refused. (Childers v. Brown, 1.)

Trial—Action on Contract—Instruction—Application to Evidence.

3. In an action by an architect for the price of house plans, an instruction that, if the jury should find that the contract between plaintiff and defendant was that if defendant did not build he was not required to pay for the plans, verdict must be for him, even though he agreed or promised to build, and yet did not do so, and that such promise, if made, did not change the contract, was properly modified by adding, "unless you should find from the evidence that it was the intention of the parties to so change the contract," where there was evidence that a change had been agreed upon. (Wicks v. Sanborn, 366.)

Trial—Instructions—Province of Jury—Law Question.

4. In an action by an architect for the price of house plans ordered by a contractor acting for the owner, where the court instructed that, if the contractor was used as the medium through whom the contract was made, then both parties to the action would be bound by the terms of the contract, provided the contractor correctly rep-

resented them to the respective parties, the quoted language of the instruction, that if the jury should find from the preponderance of the evidence that the contractor was not the agent of the owner "to the extent of having power to bind him," unless he should have fully and honestly represented to the owner the full terms of the contract and then have the owner ratify them, was not improper, as permitting the jury to decide what the agent might do by virtue of his authority, a question of law for the court. (*Wicks v. Sanborn*, 366.)

Trial—Instructions—Evidence.

5. In an action by a constructor's helper in the employ of an elevator company for injury while engaged in repair work on the premises of a realty company by reason of the employer's failure to provide a safe place in which to work, an instruction that, if there was a safe way to do the work and plaintiff voluntarily chose an unsafe way, his negligence would defeat recovery was properly refused, where there was no evidence that there were two ways of doing the work, one dangerous and the other safe. (*Gunnell v. Van Emon Elevator Co.*, 408.)

Trial—Instructions.

6. Error cannot be predicated upon refusal of an instruction substantially covered by others given. (*Brewster v. Crook County*, 435.)

Trial—Evidence—Admissibility for Particular Purpose.

7. Where the order of the County Court was inadmissible to prove heirship to the realty, but was nevertheless competent to prove ownership of the personalty of deceased, its incompetency for one purpose did not destroy or affect its competency for the other. (*State v. Finnigan*, 538.)

Trial—Instructions—Requests.

8. Although refusal of an instruction limiting the evidence to the single issue as to personalty would be an error, no error can be predicated upon the court's failure in that respect, in the absence of a request. (*State v. Finnigan*, 538.)

Trial—Direction of Verdict—Particular Finding of Fact.

9. When a cause is finally submitted, if it appears from the evidence received that one of the parties is entitled, as a matter of law, to a particular finding of fact, it is incumbent on the court, when so requested, to direct a verdict to that effect. (*Treadgold v. Willard*, 658.)

See Criminal Law, 7-9, 16.

See Embezzlement, 3.

See Escheat, 3.

TROVER AND CONVERSION.

Trover and Conversion—Acts of Conversion—What Constitutes.

1. It is no conversion for the purchaser under executory contract of wood, to be delivered at a station, to take such wood as is placed there by the seller, in the absence of notice not to remove it. (*Kondo v. Aylsworth*, 225.)

TRUSTEE.

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Conversion by Trustee.

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VENDOR AND PURCHASER.**Vendor and Purchaser—Bona Fide Purchaser—Actual Notice.**

1. Where a vendor, before delivering his deed, fully informed the purchaser of the vendor's contract with a third party and that a deed had been placed in escrow for such third party, the purchaser acquired no interest which he could assert against such party. (Robinson v. Scott, 20.)

Vendor and Purchaser—Misrepresentations of Quantity.

2. The introduction of the words "about" or "estimated" or "more or less" in a conveyance or contract for a conveyance does not afford a shield against liability for false representations as to acreage, and the mere fact that a deficiency is very large in proportion to the supposed quantity is often treated as in itself evidence of fraud or mutual mistake. (Jeffreys v. Weekly, 140.)

Vendor and Purchaser—Remedies of Purchaser—False Representations—Rescission.

3. Where the representations of a seller of land are false, are of material facts, and are relied upon by the buyer, it is immaterial, in the latter's suit for a rescission, whether the representations were knowingly false. (Jeffreys v. Weekly, 140.)

Vendor and Purchaser—Remedies of Purchaser—Misrepresentation by Seller—Rescission.

4. Where the seller of a ranch, who had lived thereon for 40 years, represented that it had about 60 acres of good bottom land, whereas in fact there were only about 40, while the bottom land was so placed that it was difficult to estimate its quantity on inspection, the buyer was entitled to rescind. (Jeffreys v. Weekly, 140.)

Vendor and Purchaser—Remedies of Purchaser—Rescission—Retention of Possession.

5. In a suit by a purchaser for rescission of contract of sale, the fact that the purchaser remained in possession of the property after

tender to the vendor by way of rescission is matter merely addressed to the court in adjusting the rights of the parties in relation to rents, improvements, interest or the like, and such retention of possession does not necessarily defeat the claim of rescission. (Jeffreys v. Weekly, 140.)

Vendor and Purchaser—Damages—Remote and Uncertain.

6. Injury to F., given an option on land by E. subject to lease given by E. to H., by reason of H. not breaking the sod, is not the direct and necessary result of E. not furnishing a man to assist H. in farming, as required by the lease, but is remote and uncertain; the lease merely providing that H. shall break so much of the sod ground "as he can, weather conditions and other conditions considered." (Fargo v. Wade, 291.)

Vendor and Purchaser—Conveyances — Grant of Easement—Notice—Record.

7. Purchasers of land take title with constructive notice of the grant of an easement theretofore executed and recorded. (Patterson v. Chambers Power Co., 328.)

Vendor and Purchaser — Certificate of Acknowledgment — Record—Notice.

8. A certificate of acknowledgment of a mortgage failing to name the acknowledging party does not affect the validity of the acknowledgment, where reference is made in the certificate to the party who executed the conveyance, nor does it render the record of the instrument less efficacious to impart constructive notice to a subsequent purchaser. (Coates v. Smith, 556.)

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See Waters and Watercourses, 13-16.

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WATERS AND WATERCOURSES.

Waters and Watercourses—Conveyances—Grant of Easement—Validity of Grant of Future Easement.

1. The deed of land, "together with the water-power upon said premises with the right of way over Shaw's land claim to bring all the water that may be required to run the mills thereon, and other mills or machinery that may, at any time or times, be placed upon the above-described premises of whatever kind or nature; also the right to dig the present raceway as wide and deep as may be necessary, and to bank the dirt and stone on either side; also to include sufficient dirt and stone lying adjacent to the dams for the purpose of keeping them in repair"—conveys a sufficiently present and future easement or right sufficiently definite to be valid in view of the circumstances surrounding the grant. (Patterson v. Chambers Power Co., 328.)

Waters and Watercourses—Conveyances—Grant of Easement—Duty of Grantee.

2. Nothing in such grant calls for action upon part of the grantee until the exigency contemplated in the deed shall arise. (Patterson v. Chambers Power Co., 328.)

Waters and Watercourses—Conveyances—Grant of Easement.

3. If from the terms of a grant of a raceway right of way there is manifested a clear intention that the grantee shall enlarge the space originally occupied by him in accord with the demands of the future, such enlargement will be upheld. (Patterson v. Chambers Power Co., 328.)

Waters and Watercourses—Conveyances—Grant of Easement.

4. Under an indefinite grant of an easement or right of way for raceway, with nothing to indicate that it may be changed or enlarged in the future, the first location and user fixes the limit of the grant. (Patterson v. Chambers Power Co., 328.)

Waters and Watercourses—Conveyance—Future Easement—Adverse Possession.

5. Adverse possession of grantor or his successors does not run against the right to enlarge a raceway as required by future necessities, at least until the right to enlarge has accrued, since until that time the grantee cannot object to use of land not needed by him, and is under no duty to warn the fee owners not to use such land because of his future and contingent rights. (Patterson v. Chambers Power Co., 328.)

Waters and Watercourses — Easement — Grants — Construction — "Deepen."

6. The grant of a raceway, with right to dig it as wide and deep as may be necessary to supply future defined needs, does not include or confer the right to maintain the ditch at its then depth by dumping upon adjoining property filth and silt which fortuitously accumulates on its bottom. (Patterson v. Chambers Power Co., 328.)

Waters and Watercourses—"Easements"—Raceway.

7. Rights of way for pipe-line or raceway are, in a sense easements, although there is no dominant tenement. (Patterson v. Chambers Power Co., 328.)

Waters and Watercourses—Conveyance—Easements—Termination.

8. Where an easement for raceway is conveyed as appurtenant to tract, a deed of part of the tract by the grantee passes such proportion of the easement, as the tract sold bears to the entire tract, unless the easement is reserved in the deed, and the easement is not extinguished. (Patterson v. Chambers Power Co., 328.)

Waters and Watercourses—Conveyance—Easements—Termination.

9. Even if appurtenant to an entire tract, a water right in the nature of an easement may be reserved in a grant of any parcel of such tract, without extinguishing the easement. (Patterson v. Chambers Power Co., 328.)

Waters and Watercourses—Conveyance—Easements—Termination.

10. The grantees of land subject to a recorded easement for raceway, with right of enlargement for future needs of a certain tract, cannot claim the easement is extinguished because the grantee of the raceway easement has sold part of the tract and reserved the water-power or easement, as long as the water taken is necessarily used on that tract. (Patterson v. Chambers Power Co., 328.)

Waters and Watercourses—Grant of Easement—Raceway—Manner of Use.

11. The owner of a raceway right of way for power purposes had no right to use the ditch for the purpose of floating logs, timber or cordwood, without protecting its sides from the consequent erosion. (Patterson v. Chambers Power Co., 328.)

Waters and Watercourses — Grant of Easement — Raceway — Manner of Use.

12. Courts will not interfere with a change of use of a raceway for power purposes to use for floating logs and timber unless it imposes an additional burden upon the servient tenement. (Patterson v. Chambers Power Co., 328.)

Waters and Watercourses—Services of Water-master—Compensation.

13. Complaint in action against county, alleging that plaintiff was the duly elected, qualified and acting water-master, and that he rendered services under and by virtue of the order, authority and direction of the superintendent of the division, is sufficient under section 6621, L. O. L., stating when water-masters shall begin work, to show that the work was done on direction of the superintendent. (Brewster v. Crook County, 435.)

Waters and Watercourses—Services of Water-master—"Emergency."

14. Complaint in action against county on claim for services as water-master showing that the master was busy at one point, and it was immediately necessary to supervise headgates at a distant point, and that on another occasion, the master broke his arm and was forced to have an assistant, sufficiently shows an "emergency" within the meaning of Section 6620, L. O. L., to entitle him to claim for services of assistants then appointed. (Brewster v. Crook County, 435.)

Waters and Watercourses—Water-master—Compensation.

15. Section 6619, L. O. L., providing that on approval by the division superintendent the county court shall allow and pay the water-

master's claim for services, makes it mandatory for the county court to pay a claim so approved. (Brewster v. Crook County, 435.)

Waters and Watercourses—Water-master—Compensation—Claim.

16. When the water-master performs his work under direction of the division superintendent, he need not attach a copy of the order to his bill for services, under Section 6621, L. O. L., whose requirement that the order be attached applies only when the work is done at the request of water users. (Brewster v. Crook County, 435.)

See Easements, 3.

See Navigable Waters, 1, 3.

WHARVES.

Wharves—Estoppel to Deny Landlord's Title—Statute.

1. Under Section 798, Subdivision 5, L. O. L., providing that a tenant is not permitted to deny the title of his landlord at the time of the commencement of the relation, the lessee of wharfage rights, by accepting the written agreement, was estopped from controverting his landlord's title while retaining possession of the rights secured by the lease. (Treadgold v. Willard, 658.)

Wharves—Lease—Realty Subject to Demise.

2. A wharf resting on piles driven into mud-flats was a part of the realty, which could be held under lease; so that taking possession of any part thereof under an agreement of lease created the relation of landlord and tenant. (Treadgold v. Willard, 658.)

Wharves—Lease of Wharfage Rights—Occupation.

3. Where the lessee of wharfage rights, when notified that his landlord's title was in litigation, tied the raft on which he unloaded passengers and freight from his steamboat to another wharf, but such raft constantly rested against the leased wharf, to which it was attached by a gang-plank over which the passengers and freight were landed, such lessee took possession of and occupied the leased wharfage rights. (Treadgold v. Willard, 658.)

WILLS.

Wills—Agreement to Devise—Validity.

1. It is competent for one to make a binding agreement to devise real property by his last will, as the property of a living person is his own and he has a right to contract or alienate the title either by will or testament. (Woods v. Dunn, 457.)

Wills—Agreement to Convey—Statute.

2. Section 804, L. O. L., providing that no estate or interest in real property other than a lease, etc., can be created except by conveyance or other instrument in writing, subscribed by the party creating it, etc., and Section 805, qualifying it to provide that it shall not affect the power of a testator in the disposition of his realty by last will or the power of the court to compel the specific performance of an agreement in relation to such property, and Section 7319, providing that every will shall be in writing, signed by the testator, or by some other person under his direction in his presence,

and attested to by two or more competent witnesses in the presence of the testator, were satisfied by a duly executed writing or will, giving to plaintiff 200 acres of described land on the understanding that she should furnish testator a home and care for life. (Woods v. Dunn, 457.)

WITNESSES.

Conclusiveness on Party Calling Witness.

See Evidence, 2.

WORDS AND PHRASES.

"Accident"—See Nelson v. Brown & McCabe, 472.

"Accomplice"—See State v. Edlund, 614.

"Adverse Party"—See D'Arcy v. Sanford, 323.

See French v. McKean, 683.

See Van Zandt v. Parson, 453.

"As Soon as"—See Childers v. Brown, 1.

"As"—See Childers v. Brown, 1.

"But"—See Foreman v. School Dist. No. 25, 587.

"Consideration"—See Butson v. Misz, 607.

"Counterclaim"—See Chance v. Carter, 229.

"Court"—See Webster v. Boyer, 485.

"Deepen"—See Patterson v. Chambers Power Co., 328.

"Duress"—See Baldwin Co. v. Savage, 379.

"Easement"—See Patterson v. Chambers Power Co., 328.

"Emergency"—See Brewster v. Crook County, 435.

"Equity of Redemption"—See Higgs v. McDuffie, 256.

"Error Committed During the Trial"—See White v. East Side Mill Co., 107.

"Incapable"—See In re Northcutt, 646.

"Judge"—See Webster v. Boyer, 485.

"Mental Capacity"—See Magness v. Ditmars, 598.

"Necessity"—See Childers v. Brown, 1.

"Occupation"—See Childers v. Brown, 1.

"Pleading"—See Treadgold v. Willard, 658.

"Political Party"—See Coover v. Olcott, 415.

"Prosecute"—See Service Lum. Co. v. Sumpter Valley Ry. Co., 32.

"Proviso"—See Mackenzie v. Douglas County, 442.

"Setoff and Counterclaim"—See Chance v. Carter, 229.

"Transaction"—See Chance v. Carter, 229.

"Waiver"—See Parker v. Hood River, 707.

WORK AND LABOR.

Work and Labor—Express Contract—Effect.

1. A newspaper which publishes a delinquent tax list under a contract fixing the amount of compensation pursuant to statute cannot recover a larger compensation on *quantum meruit*. (Coos Bay Times Pub. Co. v. Coos County, 626.)

WRIT OF REVIEW.

See Certiorari, 1-3.

See Counties, 8.

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